Petition

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Sixth Amendment entitle a criminal defendant to demand continued representation by a particular deputy public defender who had represented him earlier in the proceedings?

2. If it does, is a generalized complaint on the morning of trial that successor counsel is not prepared, sufficient to inform the state trial judge that previous counsel is being demanded?

3. If a state trial judge refuses to honor such a demand, must there be a reversal *per se*, or must prejudice be shown?

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The petitioner, John Paul Morris, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 29, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 649 F.2d 718 and is attached to this petition as Appendix A. The order of the Court of Appeals amending its opinion, denying the petition for rehearing and rejecting the suggestion for rehearing en banc is unreported, and is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1981. The order of the Court of Appeals amending its opinion, denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed on October 19, 1981.

This petition is timely filed within 60 days of October 19, 1981. The jurisdiction of this Court is invoked under

Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Respondent Joseph D. Slappy was charged in San Francisco Superior Court with committing rape, forcible oral copulation, burglary, robbery and false imprisonment. The San Francisco Public Defender's Office was appointed to represent him.

On the first day of trial, Thursday, September 23, 1976, Slappy complained that Bruce Hotchkiss, the Deputy Public Defender assigned to the case had

had insufficient time to prepare (RT 5-6).[1/] Specifically he asserted that Hotchkiss had only had the case for a day and a half (RT 5-6). Hotchkiss told the judge that he had been assigned the case the previous Friday, six days before trial, had reviewed the investigation and file and was fully prepared. The trial judge denied Slappy's request for a continuance based on the assurances from Hotchkiss that he was ready (RT 5-6).

The case had been transferred to Hotchkiss because Deputy Public Defender Harvey Goldfine, who had handled the preliminary hearing and investigation, was in the hospital following an operation for appendicitis (RT 7). Slappy said

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1. RT designates portions of the transcript from Slappy's first trial attached as Exhibit B to the return to the petition for writ of habeas corpus filed in the United States District Court, and subsequently lodged in the United States Court of Appeals.

that he was "satisfied with the Public Defender," but was still concerned about whether Hotchkiss was adequately prepared (RT 7). The trial then began.

On the second day of trial Slappy asked to address the court. He repeated his complaint that Hotchkiss had not had time to prepare (RT 80). The judge stated that he had known Hotchkiss as a deputy public defender for over nine years and accepted his assurances that he had had adequate time to prepare (RT 80-81). Slappy then repeated his claim that Hotchkiss had only had the case for a day and a half, and therefore could not be prepared (RT 81). In response, Hotchkiss once more reviewed his preparation for trial, which which included three interviews with Slappy, familiarization with the voluminous investigation" and preparation for cross-examination of the

prosecution witnesses (RT 82-83).

It was then that Slappy stated for the first time, "Mr. Harvey Goldfine was my attorney, and he still is" (RT 83). The judge said that because of the weekend and other court commitments on Monday, the case would be continued for three days until the following Tuesday. He urged Slappy to cooperate with Hotchkiss (RT 83-85).

On Tuesday, September 28, 1976, eleven days after Hotchkiss had been assigned to represent Slappy, trial resumed. Slappy now took the position that he did not have an attorney because his counsel was in the hospital (RT 152-153). He then said that he would not participate in the trial, and asked to be excused from the courtroom (RT 154-156). Rejecting advice from both the judge and Hotchkiss, Slappy remained adamant in his refusal to cooperate (RT 152-156).

Slappy was convicted of robbery, burglary and false imprisonment, but the jury hung on the two sex offense charges. At his retrial on October 7, Slappy again refused to cooperate with Hotchkiss, and would not take the stand to testify despite repeated pleas from his attorney that he do so (RT II 85-87; RT III 24-28).[2/] Slappy was convicted of rape and forcible oral copulation.

Slappy's convictions were affirmed by the California Court of Appeal in an unpublished opinion filed on January 25, 1978.[3/] The California Supreme Court denied hearing.

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2. RT II and RT III designate portions of the Reporter's Transcript from Slappy's second trial, attached as Exhibits C and D to the return filed in the United States District Court.

3. While not included in the return filed in District Court, a copy of this opinion is attached as Appendix C pursuant to Rule 21.1(k)(ii), Rules of the Supreme Court.

On April 12, 1978 Slappy filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, alleging a violation of his right to counsel under the Sixth Amendment to the United States Constitution. The petition was denied, and judgment of dismissal was entered, on December 7, 1978. (The memorandum and order of the district judge is unpublished, and is attached as Appendix D. The judgment of dismissal is attached as Appendix E).

Slappy appealed to the United States Court of Appeals for the Ninth Circuit. In an opinion filed on June 29, 1981, that court concluded that Slappy had been deprived of his right to counsel, and found the error to be reversible per se (Appendix A). The opinion was amended when rehearing was denied on October 19, 1981 (Appendix B).

REASONS FOR GRANTING THE WRIT

When the Ninth Circuit Court of Appeals held that respondent Joseph Slappy, an indigent criminal defendant, had a Sixth Amendment right to demand that deputy public defender Harvey Goldfine continue to represent him, it created a totally new Sixth Amendment right -- the right of continued representation. This giant stride is not supported by any decision of this or any other federal court. Indeed, it cuts across the grain and flow of the law, and is contrary to one of this Court's decisions.

By creating this unprecedented right, the Ninth Circuit injected federal courts into the allocation by state public defender offices of their resources. Once the initial assignment of a deputy has been made, control of deputies is removed from state officials,

and effectively placed in the hands of indigent defendants and the courts. The distribution of scarce state legal resources has been put under federal management.

The Ninth Circuit did not have to do this. The record shows, and the state trial court and the state Court of Appeal found, that Slappy asked for a continuance because, and only because, he claimed assigned deputy public defender Hotchkiss was not prepared for trial. In fact, Hotchkiss was fully prepared. In its zeal to reach its issue and create its new right, the Ninth Circuit read into the first day's proceedings statements made by Slappy on the second and third days of trial. By so doing, the federal court not only misread the record, it did not give the deference to the state courts which this Court has commanded.

The Ninth Circuit decided to enforce its newly created right by requiring automatic reversal. No showing of prejudice was required. This is a refusal to tailor the remedy to suit the wrong and also offends the basic thrust of this Court's decision in Chambers v. Maroney (1970) 399 U.S. 42 that belated appointment of counsel would not result in reversal per se.

The Sixth Amendment is an evolutionary concept. Argersinger v. Hamlin (1972) 407 U.S. 25, 44 (Chief Justice Burger, concurring). Action by the federal Court of Appeals in this case, on these facts, is revolutionary rather than evolutionary. For these reasons, petitioner asks that a writ of certiorari issue to restrain the Ninth Circuit.

ARGUMENT

1. In Gideon v. Wainwright (1963) 372 U.S. 335, this Court held that all indigent criminal defendants are entitled to the appointment of a lawyer to represent them. Implementation of this mandate is a process uniquely suited to the individual states. The approach taken by many states to ensure the availability of counsel for indigents has been the establishment of public defender offices. Given the increasingly heavy case loads such offices have been compelled to handle, many have found that a division of responsibility, with consequent specialization, is the most efficient method of utilizing their limited resources. Thus, some attorneys handle preliminary hearings, others motions and still others trials. See, e.g., Wice & Suwak, "Current Realities of Public Defender

Programs: A National Survey and Analysis," 10 Crim. Law Bull. 161, 172-173 (1974). Laudable though the goal of providing continuous, sequential representation for each defendant by a single deputy public defender may be, such a procedure is simply not feasible with present resources. The Ninth Circuit's intervention in the state's determination of how best to allocate limited resources transfers to the federal courts supervision of a process in which local regulation and control is particularly appropriate.

While claiming to defer to the generally accepted rule that indigent criminal defendants may not demand representation by a specific attorney,[4/] the Ninth

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4. See generally, Annotation, "Indigent Accused's Right To Choose Particular Counsel Appointed To Assist Him," 66 ALR.3d 996.

Circuit nevertheless has effectively held that once a deputy public defender has been assigned to represent one indigent defendant, he may be required to handle the case at all stages, regardless of demands made by other indigents for him to represent them. In effect, once the initial allocation of a deputy public defender is made, that decision substantially removes any further control over allocation of deputies from the public defender, and transfers it to the defendants. Until now, no court which has considered the issue has held that a defendant may insist upon representation by a particular deputy public defender. See, e.g., People v. Stroble (1951) 36 Cal.2d 615, 226 P.2d 330; Maynes v. People (1972) 178 Colo. 188, 495 P.2d 551; People v. Cox (1961) 22 Ill.2d 534, 177 N.E.2d 211. Indeed, the

Ninth Circuit itself has recently recognized this proposition. See Greenfield v. Gunn (9th Cir. 1977) 556 F.2d 935. The Ninth Circuit's preference in the Slappy opinion for continuous representation by a single deputy public defender does not support the conclusion that such continuity is constitutionally compelled.

2. The Ninth Circuit manufactured the entire issue by choosing to read Slappy's initial complaint on the morning of trial as a demand for Goldfine's services. In fact, the record on that date is totally bereft of any concern by Slappy other than with the amount of time Hotchkiss had had to prepare. Slappy's claim that Hotchkiss had only had the case for a day and a half was refuted on the record by Hotchkiss, who said he had had the case for six days, and was in fact prepared.

Slappy's first mention of Goldfine did not occur until the second day of trial, and it was only on the third day of trial, eleven days after Hotchkiss received the case, that Slappy refused to cooperate unless Goldfine represented him.

It is clear from these facts that Slappy did not insist upon representation by Goldfine rather than Hotchkiss until all other ploys for delaying or obstructing the trial had failed. This was pointed out to the Ninth Circuit in the petition for rehearing. Not only did that court misstate petitioner's position by concluding in its amended opinion that "the state has not contended that Slappy was acting in bad faith," its holding failed to give proper deference to the contrary factual findings of the state trial and appellante judges.

Sumner v. Mata (1981) ___ U.S. ___, 101 S.Ct. 764, 66 C.Ed.2d 722.

Clearly, if a trial judge is obligated to determine the availablity of a particular deputy public defender, there must be a sufficiently specific, and timely, objection by the defendant to the attorney assigned to his case, coupled with a demand that the sought-after deputy represent him. That did not happen in this case. Absent such warning to the trial judge, Slappy's claimed right to a particular counsel must fail. Cf. Wainwright v. Sykes (1977) 433 U.S. 73, 91.

3. This Court has long recognized that the right to counsel includes the right to effective assistance of counsel. Powell v. Alabama (1932) 287 U.S. 45; Avery v. Alabama (1940) 308 U.S. 444. In Chambers v. Maroney (1970) 399 U.S.42

however, a case involving the last minute substitution of attorneys by the Legal Aid Society appointed to represent the defendant, the Court refused to fashion a per se rule of reversal in every case involving the belated appointment of counsel. 399 U.S. at 54. The Court of Appeals acknowledged the holding in Chambers, but effectively refused to follow it by finding that a failure to conduct an adequate inquiry into Slappy's demand for representation by a different deputy public defender effectively resulted in a denial of his right to counsel. The inquiry was inadequate only because the state trial judge did not perceive the issue created by the Ninth Circuit's reading of the record.

This is not a case where no counsel was provided to the defendant, nor where the court did something to prevent the

attorney from discharging his functions. The case does not involve an allegation that trial counsel's representation was ineffective. Indeed, this case does not even involve a substitution of counsel by the trial court; the decision to assign Hotchkiss to Slappy's case was made by the public defender. Rather, it involves a defendant who simply refused to cooperate with his attorney, and finally found in the Ninth Circuit a court gullible enough to elevate his recalcitrance to a constitutional principle.

No decision by this Court, including those relied upon by the Ninth Circuit,[5/] requires automatic reversal

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5. Gideon v. Wainwright (1963) 372 U.S. 335; Geders v. United States (1976) 425 U.S. 80; Herring v. New York (1975) 422 U.S. 853; Glasser v. United States (1942) 315 U.S. 60, Powell v. Alabama (1932) 287 U.S. 45; Holloway v. Arkansas (1978) 435 U.S. 475.

of a conviction under such circumstances.[6] Unless the defendant can demonstrate that he was prejudiced, the refusal to grant his request that a particular deputy public defender continue to represent him should not result in a reversal. The Ninth Circuit's per se rule places a premium on disruption and noncooperation by defendants. It further erodes the ability of the criminal justice system to fairly balance its obligation to ensure all defendants a

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6. The Court of Appeals decision is also inconsistent with the requirement of other circuits that prejudice be shown when counsel is substituted over the defendant's objection. See, e.g., United States v. Poulack (1st Cir. 1977) 556 F.2d 83; United States v. Joyce (2nd Cir. 1976) 542 F.2d 158; Williams v. United States (7th Cir. 1964) 332 F.2d 36. Indeed, there appears to be a conflict within the Ninth Circuit itself on this point. Compare Releford v. United States (9th Cir. 1961) 288 F.2d 298 with Majeske v. United States (9th Cir. 1959) 266 F.2d 947.

fair trial, with its obligation to the general public to try, and punish, those persons guilty beyond a reasonable doubt of committing crimes.

CONCLUSION

The decision of the Court of Appeals represents an unprecedented and unwarranted departure from this Court's holdings on the Sixth Amendment right to counsel. The petition for a writ of certiorari should be granted.

DATED: December 8, 1981

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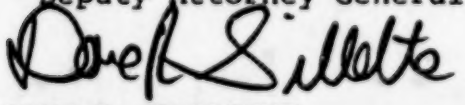

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Appendix

APPENDIX A

Joseph D. SLAPPY,
Petitioner-Appellant,

v.

Paul John MORRIS, Warden,
Respondent-Appellee.

No. 79-2519.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 14, 1980.

Decided June 29, 1981.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, ALARCON and NELSON, Circuit Judges.

ALARCON, Circuit Judge:

Joseph D. Slappy, a California state prisoner, petitioned for a writ of habeas corpus alleging, inter alia, that in his state trial he was deprived of his sixth amendment right to counsel. The district court denied the petition.

Because we find that Slappy was deprived of his sixth amendment right to counsel, we hold that the writ of habeas corpus should issue.

PERTINENT FACTS

Petitioner Slappy was charged by information in state court proceedings with rape, robbery, burglary, oral copulation, and false imprisonment. At Slappy's arraignment, the San Francisco public defender's office was appointed to represent him. Deputy Harvey Goldfine of that office represented Slappy at his preliminary hearing, and also conducted the investigation into Slappy's case.

Slappy's trial was scheduled to begin on a Thursday. On the Friday preceding trial, Deputy Bruce Hotchkiss, also of the San Francisco public defenders office, met Slappy at his jail cell, and advised him that he, Hotchkiss, would represent Slappy in trial. This

change in representation was due to Goldfine's appendicitis attack. Hotchkiss again visited Slappy on the Tuesday before trial.

On the day of trial, Slappy complained to the trial judge about the short amount of time between Hotchkiss' assignment to Slappy's case and the trial. The trial judge interpreted this complaint as a motion for a continuance, and denied the motion. Slappy continued to insist that Hotchkiss had insufficient time to prepare for trial. Hotchkiss, however, claimed that he was prepared. He explained the background of his assignment to the case, stating to the court that "Mr. Goldfine, who was to try this case, was operated on for appendicitis, that is how it was transferred." The trial judge did not inquire as to how long Goldfine would be incapacitated.

Throughout the trial, Slappy refused to cooperate with Hotchkiss and insisted that Goldfine, not Hotchkiss, was his lawyer. Slappy was so dissatisfied with his representation that he continually interrupted the proceedings, insisting that his right to counsel was being infringed.[1]

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1. For example, at one point in the trial the record shows the following occurred:

> THE DEFENDANT: Your Honor, I'm leaving that part up to you. I asked you may I be excused. If you don't want to excuse me, I'll sit right here. What difference does it make?
> THE COURT: Well, I would urge you then Mr. Slappy to remain seated and in the Courtroom, and should you desire to discuss this case further with your Counsel, why you certainly can let me know, or through you Counsel let me know.
> THE DEFENDANT: What do I have to say to get through to you, your Honor, what do I have to say to make you understand. I have told you two or three times, and then you keep telling me about talking to my Counsel. I don't have no attorney, I told you I don't have no attorney.

(Footnote continued on next page.)

Slappy was convicted of robbery, burglary, and false imprisonment. The jury was unable to agree on the rape and oral copulation charges and a mistrial was declared on those charges.

A second trial on the remaining charges began the next week, with Hotchkiss remaining as Slappy's counsel. Slappy continued to insist that Goldfine,

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Footnote 1 continued:

> My attorney's in the hospital, my attorney's name is Mr. P.D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital.
> THE COURT: Well, I am going to ask you then under the circumstances, Mr. Slappy, to remain in the Courtroom and to listen to the proceedings and listen to the progress of this case.
> THE DEFENDANT: That's up to you, that's up to you what you do, your Honor. If you say so I'll remain here, but I am not participating in the trial, I'm through with it, as of now I am through with this trial. I was through with it the 24th when this P.D. told me that I didn't have no defense from my charges. I was through then, and that's why I didn't see him when he come down to see me.

not Hotchkiss, was his attorney. Communication between Slappy and Hotchkiss broke down to such a point during the second trial that Hotchkiss asked the court to remove him as counsel because he felt he could not render effective assistance in the face of such conflict. After a conference in chambers, Hotchkiss withdrew his motion. Slappy was ultimately convicted of rape and oral copulation in this trial.

In both trials, Hotchkiss advised Slappy to testify. Slappy refused to testify in the first trial, and only decided to testify in the second trial after the jury was instructed. This request was denied by the trial court.

Slappy's convictions were affirmed by the California Court of Appeal, and the California Supreme Court refused to grant a hearing. Slappy thereafter filed a petition for writ of habeas corpus in

the District Court for the Northern District of California. The issues raised in the petition for habeas corpus were fairly presented to the California courts.

DISCUSSION

Slappy contends that the trial court's refusal to grant a reasonable continuance until his attorny, Harvey Goldfine, was well enough to represent Slappy at trial was a denial of his sixth amendment right to counsel.

We recognize at the outset that an indigent defendant does not have an unqualified right to the appointment of counsel of his own choosing. See Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970). But cf. Harris v. Superior Court, 19 Cal.3d 786, 567 P.2d 750, 140 Cal.Rptr. 318 (1977) (under certain circumstances it may be an abuse of discretion not to appoint an attorney designated by an

indigent). This is not a case of a defendant seeking to choose a particular attorney in the first instance. Here the trial court had appointed Harvey Goldfine to represent Slappy. Slappy was merely seeking a continuance of the trial date so that his attorney would be able to represent him at trial. The record clearly establishes the fact that Slappy and Goldfine had entered into an attorney-client relationship at least as of the time of the preliminary hearing.

The right to counsel includes more than just the right to representation by competent counsel at trial. This right would be without substance if it did not include the right to a meaningful attorney-client relationship.[2] The

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2. Recognizing the importance of the attorney-client relationship, courts and legislatures have instituted attorney-client evidentiary privileges to facilitate communication between attorney and

(Footnote continued on next page.)

special nature of the attorney-client relationship was explained by the Alaska Supreme Court in McKinnon v. State:

> The attorney-client relationship involves "an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney." Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to

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Footnote 2 continued:

client. See, e.g., J. Weinstein & M. Berger, 2 Weinstein's Evidence 503[02] (1979); Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960); Cal.Evid.Code §§ 950-955 (West 1980). These privileges, by protecting communications from the client to the attorney, facilitate communication. The existence of a privilege, however, conflicts with the objective of truth seeking. Despite this negative effect on the truth seeking process, the importance of open communication between client and attorney has resulted in the institution and acceptance of these privileges.

> communicate to his attorney the most intimate and embarassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered. At the very least, an open exchange between attorney and client will often foreclose the possibility of surprise at trial.

McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974) (Footnotes omitted).

The attorney-client relationship is accorded special protection because of its impact on the truth-finding process. In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Supreme Court held that a defendant in a state court proceeding could not get a

fair trial unless he had assistance of counsel at trial. But representation at trial is without substance if the defendant does not have confidence in his attorney's ability to represent the defendant's best interests. It is unlikely that a criminal defendant will have a legal education. He, therefore, will have to rely on his attorney's advice for the most basic decision in a criminal trial--whether to plead guilty, whether to testify, whether to present a defense, and which witnesses to call. If the defendant does not trust his attorney, he may be unwilling to follow his attorney's advice in these most important areas.

Several appellate courts have found unconstitutional the trial court's failure to take measures to allow the defendant to continue at trial with his retained counsel. In Releford v. United

States, 288 F.2d 298 (9th Cir. 1961), this court held that there was a denial of the right of counsel under the following facts: The defendant had retained counsel (Kay) to represent him on criminal charges. Kay became ill shortly before trial, and was expected to be unable to participate in trial for about two week. The trial court refused to grant a continuance to allow Kay to represent the defendant at trial or to allow the defendant to secure a chosen substitute for trial. Instead, the judge forced the defendant to go to trial with a second, unwanted, attorney. The Ninth Circuit reversed the defendant's conviction, holding that the defendant had been deprived of his right to counsel because the trial judge refused to grant a continuance.

Similarly, in Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978), the Fifth

Circuit held that a habeas petitioner was deprived of his right to due process when the trial judge refused to grant a continuance or otherwise insure counsel's presence. In Gandy, petitioner's retained counsel could not be present at the day of the scheduled trial because of a conflicting civil trial. The trial judge refused to grant a continuance, and forced another attorney on the petitioner. The Fifth Circuit, while noting that the decision to grant a continuance is generally vested in the trial judge's discretion, held that the refusal to grant a continuance in such circumstances was so unfair as to deny the petitioner his right to due process.

The Seventh Circuit, in United States v. Seale, 461 F.2d 345 (7th Cir. 1972), held that forcing a defendant to proceed with unwanted counsel, when retained counsel was ill, was an abuse

of discretion. The Seale court noted that the defendant should have been given a reasonable continuance to obtain the services of either his retained counsel, or some chosen substitute.

We recognize that the cases discussed above involved retained counsel. We see no reason to distinguish between appointed and retained counsel in the context of preserving an attorney-client relationship. We find ourselves in agreement with the California Supreme Court's statement in Smith v. Superior Court, 68 Cal.2d 547, 440 P.2d 65, 68 Cal.Rptr. 1 (1968),

> A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But that attorney-client relationship is not that

elementary: it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. . . . It follows that once counsel is appointed to represent an indigent defendant . . . the parties enter into an

> attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Id. at 561-62, 440 P.2d at 74, 68 Cal. Rptr. at 10. See also Cuyler v. Sullivan, 446 U.S. 335, 344-45 & n.9, 100 S.Ct. 1708, 1716 & N.9, 64 L.Ed.2d 333 (1980) (no reason to distinguish between retained and appointed counsel when determining whether defendant received adequate representation).

Because of the importance of the attorney-client relationship to the substance of the defendant's sixth amendment right to counsel, we hold that the sixth amendment (as incorporated by the

fourteenth amendment) encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance founded on the temporary unavailability of a defendant's particular attorney. In considering the continuance, the trial court must balance the defendant's constitutional right to counsel against the societal interest in the "prompt and efficient administration of justice." Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978). In the instance case, the trial judge failed to inquire as to the probable length of Goldfine's unavailability. In the absence of the information such an inquiry would have revealed, the trial judge could not engage in the balancing required to protect defendant's rights. In refusing to grant a continuance, therefore, the

trial judge violated Slappy's constitutional right to counsel.[3]

Determining that Slappy was denied his sixth amendment right to counsel does not dispose of this claim; we must also determine whether this type of sixth amendment violation requires the defendant to establish prejudice before a writ of habeas corpus can issue. We conclude that prejudice need not be shown

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3. We do not, of course, mean to imply that a continuance must be granted whenever a defendant's particular attorny is unavailable. What is required is that the appropriate balancing take place. See Ungar v. Sarafite, 376 U.S. 575, 589, 841, 849, 11 L.Ed.2d 921 (1964). Compare Gandy v. Alabama, 569 F.2d 1318, 1324-24 (5th Cir. 1978) (granting habeas petition because trial court's evaluation of factors and reconciliation of values in refusing to grant a continuance was so arbitrary as to violate principles of due process) with Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 922, 92 S.Ct 960, 30 L.Ed.2d 793 (1972) (dening habeas petition based on conclusion that trial court's denial of continuance based on medically related absence of attorney was in accordance with due process).

under these facts. In Releford v. United States, 288 F.2d 298 (9th Cir. (1961), this court stated:

> Apart from the question as to whether [the second attorney] had time to prepare, no actual prejudice was shown with respect to his participation in the trial as counsel for Releford. In our view, however, where there has been complete disregard of the defendant's right to choose his own counsel, prejudice will be presumed. Id. at 302 (emphasis added).

In another portion of the opinion, the court stated that the denial of the right to counsel under those facts "is reversible error regardless of whether prejudice is shown." Id. at 301.

In holding that under these facts no showing of prejudice is required for reversal, we are acting consistently with Supreme Court and Ninth Circuit precedents. There are two lines of Supreme Court cases which deal with right of counsel: one holding that no showing of prejudice is required for reversal; the other requiring a showing of prejudice for reversal. This case fits within the former, not requiring a showing of prejudice for reversal.

These two lines of cases were discussed, compared and distinguished in Cooper v. Fitzharris, 568 F.2d 1325, 1331-33 (9th Cir. 1978) (en banc) cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979). In Cooper, a habeas petitioner asserted that he received ineffective assistance of counsel based on defense counsel's acts and omission at trial. This court held that: "When the

claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct." Id. at 1331. As support for this statement, the Cooper court cited Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). In Chambers, a habeas petitioner alleged that a belated appearance of counsel resulted in his being rendered ineffective assistance of counsel. Specifically, he alleged that defense counsel failed to make certain suppression motions. The Supreme Court held that an inquiry into prejudice was warranted before reversal.[4]

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4. In holding that prejudice is not required in the instant case, we are not ignoring the following language in Chambers: "But we are not disposed to

(Footnote continued on next page.)

In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and

---

Footnote 4 continued:

fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel. . . ." 399 U.S. at 54, 90 S.Ct. at 1982-1983. The instant case presents an unusual claim arising from a case of attorney substitution and a consequential belated appointment. The allegation here is not that the belated appointment prevented counsel from performing acts at trial resulting in effective assistance; the claim is that the court, in not allowing a reasonable continuance, prevented counsel from fulfilling normal functions--from forming and exploiting an attorney-client relationship with defendant. The crux of Slappy's claim is that the court's actions denied him of his right to counsel. Chambers is readily distinguishable. Its language, therefore, does not suggest that we must require some showing of prejudice to justify a reversal in this case.

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the Supreme Court held that, under the facts presented therein, prejudice was irrelevant when the right to counsel was denied. In these cases, either no counsel was provided, or counsel was prevented by the court from fulfilling normal functions. In Gideon, no defense counsel was appointed. In Geders, the court prohibited counsel from consulting with his client during an overnight, midtrial recess. In Herring, a state statute allowed the trial judge to prohibit defense counsel from making a summation. In Glasser, as in Holloway, the court required defense counsel to represent defendants with conflicting interests. In Powell, the court did not provide

defense counsel with adequate opportunity to consult with defendants and prepare for trial.

In reconciling these cases with Chambers, the Cooper court wrote: "When no counsel is provided, or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." 586 F.2d at 1332. The instant case is analogous to the Gideon-Geders-Glasser line of cases. The trial court's failure to consider adequately Slappy's attorney-client relationship when ruling on the continuance denied Slappy his sixth amendment rights to counsel. The second attorney's effectiveness at trial was irrelevant to the impact of the denial of the right to counsel.

Slappy also contends that he was deprived of effective assistance of counsel because the trial judge refused to remove his attorney, Hotchkiss, after a showing of irreconcilable conflict. Because we reverse and remand on grounds mentioned above, it is unnecessary to reach the merits of this issue.

Slappy's contention that he was denied due process because the trial judge refused to allow him to testify also has been renderd moot by our disposition of the matter.

The judgment is REVERSED. On remand, the district court may temporarily hold Slappy's petition in abeyance and shall grant the petition unless California authorities, within a reasonable period, not exceeding sixty days, grant Slappy a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH D. SLAPPY, Petitioner-Appellant,	)	No. 79-2519
v.	)	O R D E R
PAUL JOHN MORRIS, Warden, Respondent-Appellee.	)	Filed October 19, 1981

Before: GOODWIN, ALARCON and NELSON, Circuit Judges

The Opinion filed on June 12, 1981, in the above-entitled case has been amended as follows:

On the slip op. 3172, add the following (such addition to follow the last paragraph on said page 3172):

> The record clearly demonstrates the sincerity of Slappy's desire to be represented by Goldfine, and the state has not contended that Slappy was acting in bad faith. In concluding that Slappy was denied his

> sixth amendment right to counsel, we find it significant that there is nothing in the record from which it can be inferred that Slappy's request for a continuance was motivated by a desire to delay his trial for an improper purpose. We need not reach the question here of whether the same result would obtain if it were shown that the defendant's request for a continuance was made in bad faith.

On the slip op. 3174, add the following paragraphs just prior to the first full paragraph on the second column of page 3174:

> "Our holding that Slappy need not establish prejudice is not inconsistent with United States v. Veatch, 80-1567 (9th Cir. June 12, 1981). In Veatch, on the second and last morning of trial, one of the

defendant's three lawyers received word that his father died during the night. The defendant moved for a continuance so that the attorney could return home and make the necessary arrangements. The district court denied the motion. The attorney decided to remain at trial and participated in the closing arguments. On appeal, the defendant contended that the denial of the continuance required reversal of the conviction. The circuit court disagreed, stating that "[a]ctual prejudice to the defendant must be shown before the denial of a continuance will be reversed." Id., slip op. at 2846.

In the instant case, however, the question is not whether the district court properly denied a continuance. Rather, the question

here is what inquiry a trial court judge must make before ruling on a continuance motion. We have held that because the attorney-client relationship is so important to the right to counsel, it must be accorded weight in the trial judge's decision as to whether to grant a continuance. If a trial court does not attempt to ascertain the length of continuance necessary to insure counsel's presence at trial, and the attorney with whom the defendant has an attorney-client relationship does not appear at trial, then the defendant has been deprived his or her right to counsel. The conviction must be reversed, irrespective of any showing of prejudice.

Veatch is distinguishable in that the attorney remained at trial and therefore the attorney-client

relationship was not affected by the denial of the continuance. Also, in Veatch, it is not apparent from the opinion whether the court ascertained the length of continuance necessitated because of the death of the attorney's father.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and has been further advised of the amended opinion, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

vs.

JOSEPH DAVID SLAPPY,

Defendant and Appellant.

1/Crim 16217

(Superior Court No. 92747)

Filed Jan. 25, 1978

Joseph David Slappy appeals from judgments of imprisonment which were rendered after jury trials resulted in verdicts finding him guilty of rape (Pen. Code, § 261.3), second degree burglary (Pen. Code, § 459), second degree robbery (Pen. Code, § 211), oral copulation (Pen. Code, § 288a) and false imprisonment (Pen. Code, § 236).

Appellant accosted the victim in a liquor store and was ordered by the manager to leave. When the victim later left the store, she saw that appellant was waiting outside. She got free from

him briefly but when she entered her apartment nearby, appellant was waiting in the lobby. Appellant forced her into the basement of the building, where he committed the offenses mentioned above.

Finally, the victim escaped from appellant. She immediately gave a description of appellant to the police. Appellant was captured two blocks away. Earrings and other jewelry belonging to the victim were found on his person.

Appellant contends, citing People v. Marsden (1970) 2 Cal.3d 118, that it was an abuse of discretion for the court to decline to substitute new counsel for appellant in place of the deputy public defender who represented him in both trials. It is claimed that relationships between appellant and his counsel had broken down, to the point that communication was impossible and appellant was, as a result, deprived of effective

assistance of counsel (citing People v. Williams (1970) 2 Cal.3d 894). No contention is made that defense counsel was incompetent or unprepared. The record does indicate that appellant's conduct at trial was refractory and inappropriate. But his own misconduct and failure to cooperate adequately with counsel does not establish entitlement to appointment of new counsel (People v. Walker (1976) 18 Cal.3d 232.) Appellant's real object at trial apparently was that he preferred to be assisted by another deputy public defender who had originally been assigned to the case but had been relieved in order to have surgery for appendicitis. Appellant told the court: "I'm happy with the public defender, but it's just no way, no possible way, that he has had enough time to prepare this case." But the

deputy who had been substituted represented to the court that he was ready for trial. He participated vigorously and appropriately in the defense of the action and there is no indication that he was unprepared or incompetent. Therefore, it was not an abuse of discretion to decline to appoint other counsel.

Appellant contends that it was error for the court to refuse to allow him to testify. The request was not made until after arguments and instructions, at a time when the jury was about to leave the courtroom to commence deliberating. At a reported hearing in chambers, it was established of record that appellant had earlier rejected the advice of his attorney that he should testify. The question whether a party should be allowed to reopen a case for the presentation of more evidence after counsel have argued is left to the sound discretion of the trial

judge. (People v. Newton (1970) 8 Cal. App.3d 359, 383.) Where appellant had earlier refused to testify, it was not an abuse of discretion to decline to re-open the case for taking his testimony.

Appellant contends that the court should have granted a motion made by defense counsel to have the jury view the entrance of the victim's apartment. The trial judge has discretionary power to determine whether to order a view. (People v. Wheeler (1971) 23 Cal.App.3d 290.) Here, there was substantial showing that a view of the entryway would assist the jury to understand the testimony. As the trial court appropriately observed, photographs were in evidence that clearly showed the area in question. It was not an abuse of discretion to deny the motion for a view of the scene.

Affirmed.

Christian, J.

We concur:

Caldecott, P. J.

Ragan, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH D. SLAPPY, Petitioner, v. PAUL JOHN MORRIS, Warden, Folsom State Prison, Respondent.	No. C-78-0796 RFP Filed December 7, 1978 MEMORANDUM AND ORDER

In 1976 petitioner, Joseph D. Slappy, was charged with rape, burglary, robbery, oral copulation, and false imprisonment. When he was arraigned on the information, the San Francisco Public Defender's Office was appointed to represent him. The preliminary hearing and investigation of the case were handled by Deputy Harvey Goldfine. Shortly before trial, however, Goldfine was operated on for appendicitis, and the case was reassigned to Deputy Bruce Hotchkiss. Although Hotchkiss assured the court that he had had adequate time

to prepare for trial, petitioner was convinced that Hotchkiss had not had time to prepare. Petitioner refused to cooperate with Hotchkiss, insisting that his attorney was Goldfine and not Hotchkiss.

Following a trial in the Superior Court for the City and County of San Francisco, petitioner was convicted of second degree burglary, second degree robbery, and false imprisonment, but the jury was hung on the other two charges, as to which a mistrial was declared. A second jury convicted petitioner of rape and oral copulation. Petitioner, who is in the custody of the California Department of Corrections, now petitions this court for a writ of habeas corpus, alleging that he was denied his right to assistance of counsel and the opportunity to testify.

As his principal ground for relief, petitioner alleges that a substitution of

counsel should have been ordered and that he was denied his right to assistance of counsel. It is clear from the record that petitioner's complaint is not that Hotchkiss was incompetent but rather is that Hotchkiss was assigned to the case only a few days before petitioner's first trial commenced and that petitioner wanted to be defended by Goldfine. Both of these objections are without merit, however.

Hotchkiss assured the court before the first trial commenced that he had had adequate preparation time. He also had three days (including a weekend) between the conclusion of the prosecution's case and the presentation of the defense's case and a week between the first and second trials. The record supports the trial judge's conclusion that Hotchkiss had adequate time to

prepare for the trials and that he presented an able defense despite petitioner's lack of cooperation with him.

Petitioner's suggestion that he should have been represented by Goldfine is likewise not persuasive. While a defendant's choice of counsel should not be subject to unnecessary interference, the right to pick a particular attorney is not unlimited. United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978). A defendant may not insist upon substituting another attorney if that will delay or obstruct reasonable court procedure. See, e.g., Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977). In this case, it was not unreasonable to conclude that the efficient administration of justice required that petitioner be represented by Hotchkiss

rather than by Goldfine after the latter had fully recovered from his surgery.

Petitioner also alleges that he was denied the opportunity to testify. The record shows, however, that petitioner refused to testify at his first trial despite his attorney's request that he do so and that petitioner had the opportunity to testify at his second trial but did not ask to do so until after the jury instructions had been given.

While a defendant has a fundamental right to testify at his trial in California, People v. Robles, 2 Cal.3d 205, 215, 466 P.2d 710, 85 Cal.Rptr. 166 91970), this privilege "must be claimed or it is waived." United States v. Ives, 504 F.2d 935, 939 (9th Cir. 1974), vacated mem., 421 U.S. 944 (1975), reinstated on this point, 547 F.2d 1100 (9th Cir. 1976), cert. denied, 429 u.S. 1103 (1977). The privilege to testify may be

waived by the conduct of the defendant. Id. at 941. In light of defendant's opportunities to testify and his conduct during the second trial, the trial judge did not abuse his discretion by refusing to allow petitioner to testify after the jury instructions had been given.

For the foregoing reasons, the petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

Dated: December 6, 1978

ROBERT F. PECKHAM (signed)
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH D. SLAPPY, Petitioner, v. PAUL JOHN MORRIS, Warden, Folsom State Prison, Respondent.	No. C-78-0796 RFP Filed December 7, 1978 JUDGMENT OF DISMISSAL

The petition for habeas corpus having come before the court, the Honorabale Robert F. Peckham, District Judge, presiding, and the issues having been presented, and a decision having been duly rendered,

It is ordered and adjudged that:

The petition for writ of habeas corpus is hereby denied and the action dismissed.

IT IS SO ORDERED.

Dated: December 6, 1978

ROBERT F. PECKHAM (signed)
United States District Judge

Joint Appendix

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1095

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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Respondent

PETITION FOR CERTIORARI FILED DECEMBER 11, 1981
CERTIORARI GRANTED MARCH 29, 1982

CHRONOLOGICAL LIST OF RELEVANT DOCKET FILES

September 28, 1976 -- Conviction of second degree burglary (California Penal Code section 459), second degree robbery (California Penal Code section 211) and false imprisonment (California Penal Code section 236) by jury in the Superior Court of California, City and County of San Francisco.

September 29, 1976 -- Jury hung on two other charges and a mistrial declared.

October 7, 1976 -- Conviction of forcible rape (California Penal Code section 261.3) and forcible oral copulation (California Penal Code section 288a) by jury.

October 20, 1976 -- Abstract of Judgment filed reflecting sentence to California State Prison for the term

prescribed by law on first three convictions.

October 28, 1976 -- Abstract of Judgment filed reflecting sentence to California State Prison for the term prescribed by law on remaining two convictions.

January 25, 1978 -- Affirmance of the judgments of conviction by the California Court of Appeal, First Appellate District, 1/Crim. 16217.

March 23, 1978 -- Denial of petition for hearing by the California Supreme Court.

April 12, 1978 -- Petition for Writ of Habeas Corpus filed in United States District Court for the Northern District of California.

May 31, 1978 -- Supplement to Petition for Writ of Habeas Corpus filed.

August 22, 1978 -- Order to Show Cause filed.

September 11, 1978 -- Return to the Order to Show Cause filed.

September 22, 1978 -- Traverse to the Return filed.

December 7, 1978 -- Memorandum and Order denying Petition for Writ of Habeas Corpus filed.

December 7, 1978 -- Judgment of Dismissal filed.

December 19, 1978 -- Application for Certificate of Probable Cause to Appeal filed.

December 21, 1978 -- Order granting Certificate of Probable Cause to Appeal filed.

January 30, 1979 -- Motion for appointment of counsel on appeal filed in the United States Court of Appeals for the Ninth Circuit.

April 21, 1979 -- Order granting Motion for Appointment of Counsel on Appeal filed.

June 17, 1979 -- Appellant Slappy's Opening Brief filed.

June 26, 1979 -- Appellee's Brief filed.

May 14, 1980 -- Matter argued and submitted before Judges Goodwin, Alarcon and Nelson.

June 29, 1981 -- Opinion and judgment entered reversing the District Court judgment and remanding to the District Court to hold the Petition in abeyance and grant it unless California authorities granted appellant a new trial within 60 days.

July 13, 1981 -- Petition for Rehearing and Suggestion for Rehearing En Banc filed.

October 19, 1981 -- Order amending opinion, denying rehearing and rejecting a rehearing en banc filed.

October 22, 1981 -- Motion for Stay of Mandate filed.

November 5, 1981 -- Order granting Stay of Mandate until November 21, 1981 filed.

November 16, 1981 -- Motion for additional stay of mandate filed.

November 30, 1981 -- Order granting additional stay of mandate until December 21, 1981 filed.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, vs. JOSEPH DAVID SLAPPY, Defendant & Appellant.	No. 92747

REPORTER'S TRANSCRIPT

Before HONORABLE HARRY W. LOW, JUDGE,
San Francisco, California,
September 23, 1976
through
September 28, 1976

APPEARANCES:

For the People:
Joseph Freitas, Jr., District Attorney
By: Robert Dondero
Assistant District Attorney

For the Defendant:
Robert Nicco, Public Defender
By: Bruce Hotchkiss
Assistant Public Defender

[1] THURSDAY, SEPTEMBER 23rd, 1976, 3:15 p.m.

[5] THE DEFENDANT: That is why I say in the first place I only have this P.D. for a day and a half, we have not had time to prepare this case. He came in Tuesday night, last Tuesday night was the first time I saw him was Tuesday night, this past Tuesday night, and today is Thursday. We have not had enough time to prepare this case.

THE COURT: Do you want to present any evidence challenging the fact that you were convicted of a robbery in 1973, or do you want to give up the right to challenge that at this time?

THE DEFENDANT: I don't -- I want this case represented properly, this case, now this present case, this is the case I am interested in.

THE COURT: I understand your request, but any continuance will be

denied in this matter, Mr. Slappy, I have been informed by the District Attorney and the Public Defender in this case, this case has been assigned to Mr. Hotchkiss since last Friday, he's investigated the case, studied it --

THE DEFENDANT: Right your Honor, excuse me, he was assigned last Friday, but I never got a chance to -- he never interviewed me until the next week, the following Tuesday he came up, this past Tuesday was the first time. He said he was busy and he couldn't make it up there. He only been on this case one day [6] and a half your Honor, he can't possibly have had enough time to investigate all these things in this case. Some of the major issues have not been investigated. It's impossible for him to have time enough to take care of this case to represent this case properly, the way it should be represented. My life is at

stake, I am the one on trial, ain't nobody to be responsible for serving time for me, I am the one.

THE COURT: Well, I examined the preliminary hearing transcript and I am satisfied that the Public Defender's Office has very adequately represented you up to now. I am confident from the assurances that have been given to me partly by Mr. Hotchkiss and by the District Attorney that an able and adequate defense can be presented for you. I am not going to grant you a continuance. Mr. Slappy, as to the prior convictions here alleged that you were convicted of these two prior felonies, do you want to give up your right to question and cross-examine any evidence that the District Attorney might present saying that you were convicted in 1968 and 1973?

THE DEFENDANT: I don't want to give up my rights, no I don't.

THE COURT: Before you do say that, Mr. Slappy, I want you to understand that if you want to question that evidence, then the Jury will hear the fact that you possibly were convicted of these two prior felonies.

THE DEFENDANT: That's right, alright, they can hear it, that's okay, that's right.

THE COURT: Do you want to discuss this with your client a little more and we could take this up tomorrow morning?

[7] MR. HOTCHKISS: Yes your Honor.

THE COURT: Perhaps we ought to do that.

MR. HOTCHKISS: There are certain other matters I would like to present, your Honor. Mr. Slappy stated his position, his feelings. I would only state this for the record. I did speak with

Mr. Slappy on Friday and based upon the state of the case, the investigation that has been done, I feel that I am prepared. My own feeling is that a further continuance would not benefit me in presenting the case. That is based upon, and again for Mr. Slappy's benefit, that is based upon the file as I received it from Mr. Goldfine, and the investigation that had been done previously. Mr. Slappy has indicated to me that he desires a Jury view, I think this is something that should be developed later, he desires a Jury view of the premises. I think it will become obvious during the trial what we are talking about, 120 Ellis Street. I would concur in that and I do intend to make that motion when it is appropriate. That is the only comment I have. One other thing by way of background. Mr. Goldfine, who was to try this case, was

operated on for appendicitis, that is how it was transferred.

THE DEFENDANT: Your Honor, let me say this sir, I appreciate it. I'm satisfied with the Public Defender, but it's just no way, no possible way, that he has had enough time to prepare this case. There is no way a day and a half, there is no way. Some of the major issues have not been investigated. That is why if you just going to push me on anyway like that, there is nothing I can do but just let you push me. At least I'd like for the Jury to go the scene where this incident took place, go [8] inside and look at the place.

MR. HOTCHKISS: I would concur with Mr. Slappy's request, I think it's valid, and I believe we'll present evidence that will convince the Court of that.

MR. DONDERO: For the record, your Honor, I should state I have a couple of

weeks ago gone down to the scene of some of the incidents, talked to some witnesses who indicated to me they were interviewed by an investigator from the Public Defender's Office, some of them 3 or 4 times at least way before two weeks ago. I submit that the Public Defender apparently has had investigators out there, they have talked to the owner of Lambo's, they have talked to the grocery store people, talked to several people in this case 2, 3, and 4 times. I submit they have prepared issues that were presented by Mr. Slappy to them at the early presentation of the case.

[70] THE DEFENDANT: I object sir, your Honor, I object. Everytime he asks a question he answers it. Let's let the witness answer the question. Ask her direct, ask her a question, and then she can give a direct answer yes or no.

Don't anticipate her, let her answer the question.

THE COURT: Mr. Slappy, you have no standing to object and your Counsel --

THE DEFENDANT: I have got no defense counsel, this man has only been on this case a day and a half, I don't know what he's doing.

MR. DONDERO: If the Defendant persists, I am going to ask he be physically removed as being disruptive of the Court proceedings.

MR. HOTCHKISS: I object to that, your Honor.

THE COURT: I want to warn you, Mr. Slappy, if you do persist in this activity I will have to remove you. I would appreciate it and it would be to your benefit --

THE DEFENDANT: Yes, I am trying to.

[71] THE COURT: Please keep quiet and you will have full opportunity to

discuss this matter with your attorney. Ladies and gentlemen, once again please disregard the statements that have been made, and they are certainly not under oath, and the accuracy of those statements are not to be considered by you in anyway. Mr. Hotchkiss, would you kindly proceed.

[79] FRIDAY, SEPTEMBER 24, 1976, 11:05 a.m. (The District Attorney, Counsel for the Defendant and the Defendant were present. The following proceedings were had out of the presence of the Jury.)

THE COURT: Let the record show we are in open court out of the presence of the Jury. Mr. Slappy wishes to make a statement to the Court. Mr. Hotchkiss do you have any objection to his doing so?

MR. HOTCHKISS: As long as, I assume you are not going to talk about the facts of the case.

THE DEFENDANT: The Judge said I could make a statement.

MR. HOTCHKISS: I have no objection to Mr. Slappy making a statement as long as he does not discuss the facts. It is my understanding that Mr. Slappy has not told me what he wants to discuss with the Court. Just from my brief conversation with him, it is my understanding he wants to discuss his feelings about Counsel. That I have no objection to. I think he was every right [80] to do that. I would advise Mr. Slappy if he discusses the facts of the case, I would advise him not to discuss the facts of the case.

THE COURT: Alright, go ahead Mr. Slappy.

THE DEFENDANT: Your Honor I am merely saying as I told you, as I told

you before, this P.D. only had his case one day and a half, and there's no way he could possibly have had time to prepare this case, no way. It's just, it's not fair, your Honor, it's just not fair. I'm being tried, I have feelings just like everyone else have, I don't have representation here, I am not qualified to represent myself, and I know I'm not. I need Counsel.

THE COURT: Well, I would say to you once again, I have known Mr. Hotchkiss in the Public Defender's Office for probably all of his career in the Public Defender's Office, having sat in the Court for more than 9 years, almost 10 years.

THE DEFENDANT: That's not what I mean.

THE COURT: I have every confidence in Mr. Hotchkiss.

THE DEFENDANT: I don't mean he's not a good P.D., I don't have anything against him. It's just that he didn't have time to prepare the case, one day and a half.

THE COURT: He tells me that this case was assigned to him last Friday, a week ago, and he read the transcript, that the case was well prepared by Harvey Goldfine who is also a very capable Assistant Public Defender, and who I have known for substantially all his career in the Public Defender's Office. When Mr. Hotchkiss makes a representation that he has prepared the case, reviewed all the matters, obtained the pictures, and other items that he intends to produce into evidence, I have no reason [81] to dispute, doubt that.

THE DEFENDANT: Yes sir.

THE COURT: I am satisfied in the way the case is progressing that

Mr. Hotchkiss is doing a more than adequate job, a very fine job. I think that maybe a matter that you are concerned about is that he didn't see you until about a day or two ago, or two or three days, but that is one phase of the preparation of the case, so I would urge you to cooperate with your Counsel as much as possible, and if this case extends beyond the weekend, as it certainly appears it will, there will be a three day period of time, and perhaps additional things you wish done can be considered and examined and might even be done if that is necessary. I would certainly urge you to cooperate with your Counsel.

THE DEFENDANT: I am trying to your Honor. We've got to be together, we've got to be together, that's the thing. As far as Mr. Goldfine, I haven't seen Mr. Goldfine in five weeks. I saw him

twice, I haven't seen him in five weeks, and last Friday Mr. Hotchkiss comes up and introduces himself to me and tells me that he would be back the following Monday to go over my case with me, because we were suppose to start trial the following Thursday. I didn't see Mr. Hotchkiss until Tuesday night. He told me that he was busy and he couldn't get there. Now, that only left him, your Honor, one day and a half to prepare my case, one day and a half, and there is no possible way he could prepare this case in a day and a half. There's some major things that have not been investigated. That is why, your Honor, I would like very much for the Jury to go on the scene and investigate that place. It's only fair. I'd like to go with them.

[82] THE COURT: Do you have anything further?

MR. HOTCHKISS: Your Honor, I would like to make a brief record and state for the record, it is true I received the case Friday. I recall telling Mr. Slappy I would see him the following Monday in Court. I don't recall, I may very well have, I don't believe I told him I would see him Monday except in Court, which I did. I did see him Tuesday morning -- no, Tuesday afternoon when I discussed the case with him from possibly a little after 1:00 until about 4:20. Then on Wednesday I talked with him, if I recall correctly, Wednesday morning, and late Wednesday afternoon. That is my recollection, Mr. Slappy, I am not absolutely positive. The point I want to make is to protect Mr. Slappy's record, when I announced I am ready, I feel I am ready. Mr. Goldfine did voluminous investigation in the case. My feeling is that all investigation that

needed to be done and that should be done and quite possibly that could be done has been done. To protect Mr. Slappy the investigation -- the memorandum of investigation is in the file and will remain in the file. I don't intend to lose this case, but if I do I think that ought to be opened to the Appellate Court. When I announce ready, my position was that all I had to do to prepare this case for trial was to come in and familiarize myself with the material that was in the file, to prepare myself with the material that was in the file, to prepare myself for the cross-examination of the prosecution witnesses. I anticipated having the weekend free and I believe that anticipation is correct, to go over and discuss with Mr. Slappy both his direct and cross-examination. To that extent, to the extent that I would have to put Mr. Slappy on the stand this afternoon, I

would not be prepared. I do anticipate and I [83] did anticipate and I announced ready on the assumption I would have the whole weekend to go through the necessary things that I would have to do to put Mr. Slappy on the stand and to prepare him both for direct examination and cross-examination. Therefore when I did announce ready, it was when the idea I was concentrating on familiarizing myself with the case and this would be both with Mr. Slappy's view of the case, and to cross-examine the prosecution's witnesses. I do think Mr. Slappy for the record, to make it in a nutshell, by announcing ready, it was based upon the file. As I say I don't anticipate on losing but if I should lose the file would be available.

THE DEFENDANT: As I was saying, your Honor, there is no possible way

that my P.D. could be prepared for this case, there is just no way, no possible way. When he come up Tuesday afternoon, he never went over the case with me. He did do one thing for me, I appreciate it, he said he would go get my clothing, he did that, I appreciate it, but now Mr. Harvey Goldfine was my attorney, he was my attorney, and he still is. I haven't seen him in five weeks because he's in the hospital. Mr. Harvey Goldfine didn't even have time enough to go over my case with me, he didn't even have time. Then five weeks ago I saw Mr. Harvey Goldfine. Then at the last day before trial Mr. Hotchkiss comes up and tells me he's my attorney. He hasn't had any kind of way at all to prepare this case, he hasn't had any kind of way at all to prepare this case, he hasn't been on the scene, he hasn't investigated anything, he

hasn't gone over anything with me or nothing.

THE COURT: As I say there will be additional time Saturday, Sunday, and Monday morning. We'll resume this case on Tuesday. We'll continue to proceed, and I urge you to cooperate with your Counsel, and I also urge you to do it in a manner that will not possibly offend the Jury, because I think when you do interrupt, the Jury loses tract, and they may take the matters in an adverse way and that would not be beneficial to your case.

THE DEFENDANT: I'm sorry, your Honor.

THE COURT: I do appreciate your emotional involvement in this case, Mr. Slappy. It's a difficult thing for everyone involved in the case. I'm sure it's difficult for the Jurors, the witnesses, and the members of the Court.

We all try to control ourselves. It will be to your advantage to do so in this matter. You will have additional time this weekend. I again urge you to work as closely as you can with your attorney.

THE DEFENDANT: Yes sir. The only way he represents me, and I know we are suppose to be together, but the only thing, your Honor, when you ask the victim a question, let her answer instead of him answer. I notice several times it looked like he was doing the answering, he anticipated her, he wouldn't let her answer the question. Half the time I couldn't even hear what she was saying.

THE COURT: If you can't hear you certainly should let Counsel know.

THE DEFENDANT: He's my P.D., he's for me or against me, he's suppose to be for me.

THE COURT: Counsel was trying to narrow the answer, one of the best tech-

niques of cross-examination is to narrow the answer so the witness cannot go on and give an expansive answer. I think this was the purpose of your Counsel's questions and that certainly is a good trial technique. Perhaps he will explain to [85] you more the reason for his very narrow questioning of this witness. It certainly appears to be a good method, a proved method that would work to your benefit, Mr. Slappy.

MR. HOTCHKISS: I would like to make one short comment. I did go to the scene and I did discuss the scene with Mr. Slappy.

THE DEFENDANT: No sir, you haven't discussed no scene with me. You told me you had not been over there. I am not going to stand up here and let you tell me that you told me you hadn't been over to the scene, and you haven't discussed it with me.

THE COURT: Let me urge you again to cooperate with your Counsel.

[151] TUESDAY, SEPTEMBER 28, 1976, 9:30 a.m. (The following proceedings were had out of the presence of the Jury.)

THE COURT: Let the record show we are in open court out of the presence of the Jury. Mr. Slappy has asked that he address the Court, and Mr. Slappy you are welcomed to do so. I mentioned this already to both Counsel, and they have told me that you wanted to address the Court. There has been no objection by either Counsel, you are privileged to do so.

THE DEFENDANT: Your Honor, I have here a petition, a Writ of Habeas Corpus against this Court.

THE COURT: Do you want to file it, is that what you want?

[152] THE DEFENDANT: I want to file it.

THE COURT: Fine. Will you take it then.

THE CLERK: Yes.

THE COURT: Would you like to say anything in support of it?

THE DEFENDANT: Oh yes. On the grounds that my attorney's in the hospital, and I don't legally have no attorney, and this P.D. here told me, this P.D., Mr. Hotchkiss, Bruce Hotchkiss, told me I didn't have no defense to my charges.

THE COURT: Well --

MR. HOTCHKISS: I didn't make that statement, your Honor.

THE DEFENDANT: Then he told me that if I wanted to I could represent myself, and I told him I wasn't qualified to represent myself.

MR. HOTCHKISS: I didn't make that statement, your Honor, Friday I believe, I told him he had a constitutional right to represent himself.

THE COURT: Well, Mr. Slappy, this is a matter that we did discuss last week, and there appears to be nothing new that has been added to what your claims are at this time. As I stated to you previously this case was well prepared, the Public Defender's Office reviewed the entire file, sent out its investigators, Mr. Hotchkiss is a senior trial attorney in the office, and has represented that he is prepared to proceed, had three days between the conclusion of the People's case and the Defense case, and there was adequate time to do further investigation to prepare for this case. A good deal of this case is one of creditability [sic], [153] creditability [sic] of the complaining witness, the alleged

victim in this case, and your credit-ability [sic] in this matter, which I gather is one of your defenses. So your request of a Writ of Habeas Corpus is denied, and it is our intentin to continue in this case, Mr. Slappy, and once again I would urge you to cooperate with your Counsel and assist him in anyway you can.

THE DEFENDANT: Your Honor, I'd like to have a copy of this writ. If you want to have the trial you just take it and go ahead and do what you want to do with it. I would ask at this time to be excused, I would like to go back to my cell. I would like to have a copy of that writ.

THE COURT: Well, you certainly can get a copy of the writ. We'll see that one is made and returned to you showing the file stamp. With respect to your desire not to participate in this case

any further, before you make that final decision, I would urge you to consider it carefully, discuss it with your Counsel.

THE DEFENDANT: I don't have any Counsel, I just got through telling you, I don't have no Counsel. My attorney's in the hospital, you know, he's in the hospital.

THE COURT: Is there any comment that you would like to make Mr. Hotchkiss?

MR. HOTCHKISS: Your Honor, here's the situation I'm in. As I indicated to the Court on Friday, I had announced ready based upon the facts, in my review of the file I felt that I could prepare the case, prepare myuself for cross-examination of prosecution witnesses, and had anticipated having the weekend to go over with Mr. Slappy both his direct and cross-examination. In [154] light of what was developed through the prosecution's case, and over the weekend, and

I had anticipated having the weekend available when I announced ready for trial on Thursday, over the weekend I went to see Mr. Slappy on Saturday, and he refused to see me on Saturday. I again went to see him Monday morning, he against refused to see me. I spoke with him in the holding cell this morning and asked him what he wanted to do, and he indicated, he said he would let me know when he got into Court. I feel that's necessary, and the whole theory of Mr. Slappy's case, based upon my discussion with Mr. Slappy, the theory of his case depends and hinges greatly upon him taking the witness stand. Because I have been unavailable or have not had the opportunity to talk with him, I am not ready to put him on the witness stand. I don't know if he wants to take the witness stand or not. That's sort of the position I'm in.

THE DEFENDANT: Your Honor, let me say this just one more time, maybe I can make myself clear. On or about the 24th day of September, last week, Mr. Bruce Hotchkiss told me that I didn't have no defense for my charges.

MR. HOTCHKISS: That is incorrect, I didn't make that statement.

THE DEFENDANT: That's it. I am asking you sir may I be excused, you can take the trial and continue to do what you want to do with it, just excuse me. I'm ready to go back to my cell.

MR. HOTCHKISS: May I just for the record, I have never told Mr. Slappy he had no defenses to the charges. I have always proceeded along the lines of the defense as outlined to me by Mr. Slappy.

[155] THE COURT: I'd like to look at this one Code Section 1043. Would you get that for me. Is there anything the District Attorney wishes to comment upon?

MR. DONDERO: Not at this time your Honor. I think Mr. Hotchkiss being an Officer of the Court has made certain representations. I think the record is clear he had the time to prepare, he's done an adequate cross-examination of the witnesses, based upon the suggested line of defense of the opening statement, and I think in view of the record that the representations Mr. Hotchkiss made are correct and accurate. The Defendant I don't think has admitted he is capable of representing himself. By his own admission he is not able to do so. Mr. Hotchkiss is the attorney representing the Defendant.

THE COURT: I take it Mr. Slappy if we are to proceed in this case that you intend to not take the witness stand?

THE DEFENDANT: Your Honor, I already told you, I repeat, I have told you I'm through, I am ready to go back

to my cell. You take the trial and go ahead and do what you want to do with it. That is my final decision.

THE COURT: Now, I want to encourage you once again --

THE DEFENDANT: I'm through.

THE COURT: It would be to your advantage to be able to hear all the testimony --

THE DEFENDANT: I'm through. As far as I'm concerned, this is not a fair trial, I am just through, that's all I've got to say, I'm through.

THE COURT: Should you voluntarily absent yourself, then the Court can make a finding, should the Court make a finding that [156] you voluntarily absented yourself we could proceed, we'll proceed, without your being present. In order for you voluntarily to do so, I want to assure myself that you understand that the case will proceed. I want you

to further understand you have a right to remain and it's to your benefit to remain. Should you choose to absent yourself, it may do damage to your defense. For that reason it will be beneficial for you to remain.

THE DEFENDANT: Your Honor, I'm leaving that part up to you. I asked you may I be excused. If you don't want to excuse me, I'll sit right here. What difference does it make?

THE COURT: Well, I would urge you then Mr. Slappy to remain seated and in the Courtroom, and should you desire to discuss this case further withyour Counsel, why you certainly can let me know, or through your Counsel let me know.

THE DEFENDANT: What do I have to say to get through to you, you Honor, what do I have to say to make you understand. I have told you two or three

times, and then you keep telling me about talking to my Counsel. I don't have no attorney, I told you I don't have no attorney. My attorney's in the hospital, my attorney's name is Mr. P.D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital.

THE COURT: Well, I am going to ask you then under the circumstances, Mr. Slappy, to remain in the Courtroom and to listen to the proceedings and listen to the progress of this case.

THE DEFENDANT: That's up to you, that's up to you what you do, your Honor. If you say so I'll remain here, but I am not participating in the trial, I'm through with it, as of now I am through with this trial. I was through with it the 24th when [157] this P.D. told me that I didn't have no defense from my charges. I was through then, and that's

why I didn't see him when he come down to see me.

[158] MR. HOTCHKISS: Your Honor, I would object to the form of proof on the 211 and ask that a certified copy of the judgment of conviction -- for the record I would object to that.

THE COURT: Overruled, objection overruled, that may go in and be considered.

THE DEFENDANT: I don't talk to you, I told you people not to talk to me, I'm through with this trial.

THE COURT: Would you seat the Jury then.

MR. HOTCHKISS: For the record, I would again encourage Mr. Slappy to admit the priors. I have discussed them with him. May I have a moment, I have an investigator out here.

[164] MR. HOTCHKISS: Your Honor, only to this extent: I would again

encourage and implore Mr. Slappy to take the witness stand, [165] because I believe his testimony would be essentially, not essentially, but highly helpful to my position. From what he has discussed with me, I think it would bolster the reason why I want a Jury view. I don't think it's essential. I would again implore him to take the witness stand and to testify.

THE COURT: With respect to that, Mr. Slappy, I take it you've heard Mr. Hotchkiss' request and I take it -- do you have anything you want to add to that at all Mr. Slappy?

THE DEFENDANT: No, you heard my statement.

[171] (The Jury, District Attorney, Counsel for the Defendant, and the Defendant were present.)

THE DEFENDANT: Your Honor, sir, you mean you would make me stay here against

my own will, that's against my constitutional rights.

THE COURT: I'd appreciate your remaining.

THE DEFENDANT: As I told you in the first place, I told you this morning when I got here, as of the 24th of September, last Friday, the Public Defender told me that I didn't have no defense on my charges.

MR. HOTCHKISS: That is not true, your Honor, I said he did have a defense.

THE DEFENDANT: My attorney which is Harvey Goldfine is in the hospital and this man comes up a day and a half ago saying he's my attorney.

THE COURT: Mr. Slappy, we went through this once before, I'll ask you to stay and --

THE DEFENDANT: Why should I stay, your Honor?

THE COURT: Please disregard these statements ladies and gentlemen.

THE DEFENDANT: I can't defend myself.

THE COURT: We went through this once before.

THE DEFENDANT: He said "if you want to you can go ahead, [172] if you don't like the way I'm running it, go ahead and defend yourself." I told him that I was not qualified to defend myself and I am not. So why would you just want to make me stay? I can't defend myself, I am helpless.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOSEPH DAVID SLAPPY, Defendant.	No. 92747

REPORTER'S TRANSCRIPT

Before HONORABLE VICTOR M. CAMPILONGO, JUDGE,
San Francisco, California,
October 6, 1976
through
October 7, 1976

APPEARANCES:

For the Plaintiff:
Joseph Freitas, Jr., District Attorney
By: Robert Dondero
Assistant District Attorney

For the Defendant:
Robert Nicco, Public Defender
By: Bruce Hotchkiss
Deputy Public Defender

[92] MR. HOTCHKISS: May I, Your Honor?

I am in a position that is rather unusual and unique in my experience. My client at this juncture is refusing to talk to me. It has become a detriment in defending him. When I got this case I discussed it with Mr. Slappy and there was -- he had been interviewed by Mr. Goldfine from our office and an investigator from our office several times. I knew the defense. I was prepared to engage in direct or in cross-examination of the prosecution witnesses. I feel that there is such a conflict between us, I can't -- he is not talking with me. I can't put him on the witness stand in this sort of situation. I don't know whether he wants to take the witness stand in his own defense. I believe that communications have broken down such that I am running out of -- I don't think I

am of effective assistance as Counsel because he has not cooperated with me. I think we have reached a situation where there is a conflict.

[93] I am aware of at least one case where there is a conflict when the communications breakdown. This usually occurs prior to trial.

THE COURT: Well, the Court is aware that Mr. Slappy assisted you. I observed him myself in the selection of the jury.

MR. HOTCHKISS: Since that time things have deteriorated to such an extent that he is not talking with me right now and I feel that there is such a lack of communication, that our communication has broken down to such an extent that private counsel should be appointed that can communicate with Mr. Slappy.

THE COURT: Well, let's go off the record. Let's go in Chambers and discuss it.

(Thereupon the proceedings in the Courtroom outside of the presence of the Jury were recessed after which the following proceedings were had in Chambers as follows, to wit:)

THE COURT: Let the record reflect the presence of the Defendant, Defense Counsel and the District Attorney. We are out of the presence of the Jury. We are involved at this time in a matter of law.

MR. HOTCHKISS: May I state for the record, the People versus Stewart, 6 Cal.App.3d, at page 457 and at page 464 and the People versus Williams, 1 Cal.3d 694 at pages 704 through 705. Based upon a further study of those cases, it's my understanding that simply a refusal to cooperate during trial is not a basis

for a conflict and I would withdraw my request to declare a conflict.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOSEPH DAVID SLAPPY, Defendant.	No. 92747 (SUPPLEMENTAL)

REPORTER'S TRANSCRIPT

Before HONORABLE VICTOR M. CAMPILONGO, JUDGE,
San Francisco, California,
October 7, 1976

APPEARANCES:

For the Plaintiff:
Joseph Freitas, Jr., District Attorney
By: Robert Dondero
Assistant District Attorney

For the Defendant:
Robert Nicco, Public Defender
By: Bruce Hotchkiss
Deputy Public Defender

[26] All right, Mr. Slappy, I am going to -- Mr. Slappy, I am going to allow you to speak so that you can make a record. It's obvious what you have done throughout this case. You have conducted yourself in a manner although not obstreperous in a sense, you have yelled out. You have taken occasion at points in the trial to stand up and say something when you knew you should not have. You have done things in Court such as sleep throughout these proceedings which you did just earlier this morning. You made all kinds of noises and it's obvious what you are trying to do. I am willing to make this record for the Appellate Court. Your Counsel, who is an extremely competent Counsel, has gone out of his way to get you to participate in this trial and you are just trying to make a record for appeal

and the record is being made. So you go right ahead, Mr. Slappy.

MR. SLAPPY: I have no business being here in Court in the first place but the thing I want to say is when the P.D. comes in the holding cell and asks me did I want to make -- did I want to take the stand, I told him I did not know yet. I had no inspirations yet and I did not know. That is what I told him. I did not know whether I wanted to take the stand or not. I did tell Mr. Hotchkiss that but then after I got out of there, I wanted to take the stand. I told him before, you know. What can I do. I did want to take the stand. I told Mr. Hotchkiss I wanted to take the stand.

THE COURT: Mr. Hotchkiss, is that a true statement?

MR. HOTCHKISS: As I recall it, I went in the holding cell this morning and I asked Mr. Slappy if he wanted to take

[27] the witness stand. He said no. He did not. I told Mr. Slappy, and I am not quoting him verbatum [sic], I told him, "No, I don't think so. No, I am not going to," or words to that effect. I said, "Okay, I will call the janitor and we will have final argument."

MR. DONDERO: In fact, I observed the Defendant during the Court's instructions to the jury make some utterances to Mr. Hotchkiss. That is the only time I have seen him move since we started the proceedings this morning.

THE COURT: Mr. Slappy has indicated throughout this case he did not want to participate, as I recall and, again, this is for the record. I know it's going to be reviewed on appeal. I am convinced Mr. Slappy has been given every opportunity to participate. He has had the opportunity. He does not seem to be willing. Mr. Slappy's rights

have been protected. I have seen Counsel plead with Mr. Slappy before this Court to admit the allegations of the prior explaining why it was important. The Court inquired on its own. Mr. Slappy was not interested. Now, Mr. Slappy --

MR. DONDERO: Mr. Hotchkiss asked the Defendant to take the stand during the question on a miranda warning.

THE COURT: That is correct.

MR. SLAPPY: I did not know. Please, sir, please, sir, may I please, sir, take the witness stand, just please, and I will feel better.

THE COURT: At this point, Mr. Slappy, I am denying it because I am not convinced. All you're trying to do is make a record for appeal and you're trying to --

[28] MR. SLAPPY: No, I just want to try to do the best I can.

THE COURT: Well, you had that opportunity, Mr. Slappy. You know you could have asked to see the Court outside of the presence of Counsel. You stood up with a purpose in front of the jury when I just got through instructing and you got up in front of that jury on purpose and stated what you wanted to say here so they would be affected by it.

MR. SLAPPY: No, sir, I told the Public Defender.

THE COURT: When the Public Defender came back to you all you had to do --

MR. SLAPPY: So he could approach you.

THE COURT: That is right. I made my decision. You have come in here and made your motion. You did what you wanted purposely. You have done it throughout the trial. The motion is denied.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1095

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the decision of the Ninth Circuit Court of Appeals be construed to allow a criminal defendant to demand the continued representation by a particular deputy public defender as a Sixth Amendment constitutional right?

2. Does the trial transcript indicate a genuine conflict with the trial attorney sufficient to justify an inquiry into the need for a continuance of the trial?

3. When the trial court forces an unwanted deputy public defender upon a criminal defendant without inquiry into the reasons for and length of a requested continuance, must prejudice be shown when a claim is made that counsel was denied?

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No. 81-1095

IN THE SUPREME COURT

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OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

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v.

JOSEPH D. SLAPPY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondent Joseph D. Slappy was charged in the San Francisco Superior Court with committing rape, forcible oral copulation, burglary, robbery and false imprisonment. The San Francisco Public Defender's office was appointed to represent him. Mr. Harvey Goldfine handled the case through the arraignment and preliminary hearing and did "voluminous investigation" (CT 5, 6; RT 82)[1]. On Friday preceding the Thursday trial day, Mr. Hotchkiss met Mr. Slappy in his cell and advised him that he was going to represent him at trial because Mr. Goldfine was in the

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1. CT designates portions of the clerk's transcript from Slappy's first trial, subsequently lodged in the United States Court of Appeals. RT designates the Reporter's transcript from the first trial lodged in the United States Court of Appeals.

hospital with an appendicitis (RT 81, 83).

Mr. Slappy hadn't seen Mr. Goldfine in five weeks (RT 83).

At that initial meeting between Slappy and Hotchkiss, Mr. Hotchkiss advised Mr. Slappy, that he, Mr. Hotchkiss, would be his trial attorney and that he would return to see him the following Monday (RT 82). Mr. Hotchkiss didn't return until Tuesday afternoon because he was busy (RT 5, 81).

Although Mr. Hotchkiss claimed otherwise, Mr. Slappy expressed to the court that Mr. Hotchkiss didn't review the case with him and advised Mr. Slappy that he had no defense to the charges (RT 82, 83, 156-157, 171).

Contrary to the assertions of the Petitioner, Respondent was satisfied

not with the Public Defender, but with Public Defender Harvey Goldfine, the public defender whom he felt was familiar with and was prepared to try his case (RT 4-5).

The three days of the trial record indicate Mr. Slappy's complete enmity towards and dissatisfaction with Public Defender Bruce Hotchkiss. This dissatisfaction was expressed on the first day of trial when he advised the court that Mr. Hotchkiss saw him initially on Friday but was too busy to consult with him in preparation of the case until the next Tuesday (RT 5). Mr. Slappy's emphatic assertions that Mr. Hotchkiss was not prepared to try the case reflect his belief that one and one-half days is insufficient to prepare a case in which there had been

"voluminous discovery". They reflect the belief that Mr. Hotchkiss could not ably defend him especially when he had just previously been informed by Mr. Hotchkiss that there were no defenses to the charges (RT 6-7).

Respondent's rejection of and conflict with his counsel was again expressed on the second day of trial, Friday, September 24, when he indicated to the court " . . . I don't have representation here, I am not qualified to represent myself, and I know I am not. I need counsel." (RT 83). Mr. Slappy also indicated to the court that " . . . but now Mr. Harvey Goldfine was my attorney, and he still is." (RT 83) The conflict was further evident when Mr. Slappy wondered aloud: "He's my P.D., he's for me or against me, he's

supposed to be for me." (RT 84) Mr. Slappy and Mr. Hotchkiss then had a heated exchange concerning whether or not Mr. Hotchkiss visited the site of the crimes (RT 84).

On the third day of trial, September 28, 1976, after a continuance from the 24th of September, Slappy indicated that he had prepared and wished to file a Writ of Habeas Corpus against the trial court (RT 151). The grounds he enumerated to the court were that his attorney was in the hospital; that he didn't legally have an attorney; and that his present attorney told him that he had no defenses to the charges (RT 152).

The court considered the Petition for a Writ of Habeas Corpus to be a reiteration of the grounds presented in the previous sessions of the trial

i.e., a request for a continuance. (RT 152).

At this point Mr. Slappy refused to cooperate further insisting that he had no counsel at the trial, that his counsel, Mr. Harvey Goldfine, was in the hospital (RT 153-158).

The sequence of events thereafter is as is set forth in the Petitioner's brief at pages 7-8.

REASONS FOR DENYING THE WRIT

The Ninth Circuit did not create a right which would allow any criminal defendant to demand continued representation by a particular public defender. The Court acknowledged that an indigent defendant did not have an unqualified right to seek appointed counsel of his choice. (Slip Op. 3170).

The Court simply held that the right to counsel is an important right guaranteed by the Sixth Amendment to the constitution and that right encompasses a meaningful relationship with counsel. (Slip Op. 3170-3172). The Court went on to hold that when the Court's interest in the "prompt and efficient administration of justice" (Slip Op. 3172) conflicts with the defendant's right to counsel, the court must weigh and evaluate the

respective interests. A court should weigh the defendant's interest in a relationship with his attorney arising out of the Sixth Amendment against the interests of the Court in moving its calendar.

The decision is a reaffirmation of this Court's decisions that the unjustified denial of a continuance could reduce the right to defend with counsel to nothing more than a mere formality. Ungar v. Sarafite (1963) 367 U.S. 575, 588-591; Avery v. Alabama (1940) 308 U.S. 444.

There is no need for the defendant to demonstrate prejudice. The Ninth Circuit limited its opinion to the specific facts in this case (Slip Op. 3173). The Court reaffirmed the rule of Chambers v. Maroney (1970) 399 U.S. 42

demanding a demonstration of prejudice by a defendant claiming ineffective assistance of counsel. But the Court found that when the trial court refused to give consideration to Mr. Slappy's Sixth Amendment right to an effective counsel in which he could place his confidence and trust, it effectively denied him counsel and thus prejudice need not be demonstrated (Slip Op. 3174), following the line of cases Gideon v. Wainwright (1963) 372 U.S. 335, Geders v. United States (1976) 425 U.S. 80, Herring v. New York (1975) 422 U.S. 853, Glasser v. United States (1942) 315 U.S. 60, Powell v. Alabama (1932) 287 U.S. 45, Holloway v. Arkansas (1978) 435 U.S. 475.

ARGUMENT

1. The decision of the Ninth Circuit cannot be construed to allow one defendant to demand a particular attorney at all stages of the proceedings "regardless of demands made by other indigents for him to represent him" and does not "substantially (remove) any further control over the allocation of deputies from the public defender." (Petition for Writ of Certiorari, p. 14).

The Ninth Circuit acknowledged that an indigent defendant does not have an unqualified right to demand a particular attorney. (Slip Op. 3170).

The ruling acknowledged that the Sixth Amendment right consists of more than just the right to an attorney present in the courtroom. McMann v. Richardson (1969) 397 U.S. 759, 771,

Tollet v. Henderson (1973) 411 U.S. 258, 264, United States v. DeCoster (D.C. 1973) 487 F.2d 1197, 1203-1204, People v. Pope (1979) 23 Cal.3d 412, 424-425.

The decision of the court allows the trial court to assess this important right to counsel by an indigent (Gideon v. Wainwright (1963) 372 U.S. 335) when it conflicts with the efficient administration of justice and the court's responsibilities in administering crowded dockets.

The court has enunciated a simple balancing test in which the trial court must balance the respective rights of parties. The trial court must consider a defendant's right to the relationship he had established with a particular attorney, impliedly to determine whether

he has obtained through the stages of representation, trusts and confidences of the defendant that a new attorney may not have yet obtained. This must be done in order to insure that the defendant's right to competent effective representation is not curtailed or denied. This interest must be balanced against the interests of the court in seeing that justice is accomplished in a timely and orderly fashion.

This court has recognized that the denial of a continuance can result in the denial of the right to counsel. Ungar v. Sarafite (1963) 367 U.S. 575, 588-591, Avery v. Alabama (1940) 308 U. S. 444.

The decision of the Ninth Circuit takes into consideration the import of Ungar and Avery and gives the trial

court a standard for insuring the indigent's right to competent counsel and the trial court's responsibility in administrating the court system.

The Petitioner's claim that the decision of the Ninth Circuit will disrupt the offices of the Public Defender is not substantiated by an unimpassioned reading of the decision. The balancing test set forth by the court allows the trial court to substitute new counsel once the court has made an inquiry into and is satisfied that the defendant's right to counsel is not infringed.

In the instant case, the trial court's refusal to inquire into the length of the unavailability of Mr. Slappy's original attorney effectively precluded the court from having

sufficient information to protect the Sixth Amendment right and as a result denied his right to counsel (Slip Op. 3172). The court also found that the desires of Slappy to be represented by Goldfine were sincere with no evidence of bad faith to delay his trial. (Amended Slip. Op. 3172). The court's failure to consider the request for a continuance in light of Sixth Amendment considerations resulted in the denial of the right to counsel.

The decision of the Ninth Circuit is not "revolutionary". It is in accord with the present status of the law and provides the trial court with an orderly standard to balance the conflicting rights guaranteed by the Sixth Amendment with the need of society to see that justice is accomplished in a timely fashion.

2. The Ninth Circuit has the power to review state court findings. Sumner v. Mata (1981) __ U.S. __, 101 S.Ct. 764, 66 L.Ed.2d 722, 28 U.S.C.A. §2254(b). The court may inquire as to the correctness of the state court rulings if one of the seven conditions set forth in 28 U.S.C.A. §2254(d) fails to exist. Sumner v. Mata, supra, at p. 771.

The Appellate Court ruled as a matter of fact that the right to counsel was violated because of the absence of the fact finding process and the failure to weigh the right to counsel against the trial court's concerns. (Slip Op. 3172).

Mr. Slappy should not be penalized for his inability to correctly articulate the precise legal and constitutional grounds of his demand for a

continuance so that Mr. Goldfine could represent him.

Petitioner's suggestion that on the third day of trial Mr. Slappy raised the issue of who his counsel was for the first time is misleading.

The trial lasted three days.[2/] A fair reading of the transcript and the complaints indicate a genuine desire to be represented by counsel whom the defendant felt competent to represent him and a complete distrust and hostility towards the attorney who was forced upon him by the trial court. The trial court considered Mr. Slappy's protests on the third day of trial to be a reiteration of the complaints previously made (RT 152).

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2. The complaints of Mr. Slappy in the first trial, the one at issue in this Petition, can be found at pages 5-8, 79-85, 150-158.

The Ninth Circuit also found the record contained a sincere desire to be represented by the attorney with whom he had established an attorney-client relationship and was not motivated by bad faith or an improper desire to delay his trial (Amended Slip Op. 3172).

Attempts by the Petitioner to isolate the requests of the Respondent to different days of the trial misconstrues the protestations of an inarticulate and indigent individual who realized that in the criminal justice system "My life is at stake, I am the one on trial, ain't nobody to be responsible for serving time for me, I am the one." (RT 6).

3. Petitioner's argument that Respondent should be required to demonstrate prejudice is incorrect.

The Ninth Circuit's ruling was that when ruling on the continuance, the failure to adequately consider the relationship between Mr. Slappy and his original attorney Mr. Goldfine denied Mr. Slappy his right to counsel (Slip Op. 3174). This interpretation is further reinforced by Mr. Slappy's complete and total rejection of Mr. Hotchkiss, his refusal to cooperate with Mr. Hotchkiss, his refusal to take the witness stand, and his act of complete frustration: filing the Writ of Habeas Corpus on the third day of trial (RT 5-8, 80-86, 151-157).

Appellant's claims are not that specific acts of Mr. Hotchkiss denied

him effective assistance of counsel in which a demonstration of prejudice would be necessary, Chambers v. Maroney (1970) 399 U.S. 42, but that the court's failure to consider the importance of the right to counsel and the rights inherent in that (attorney-client privilege, trust and confidence in the attorney) denied the Sixth Amendment right, and hence no prejudice need be demonstrated. Gideon v. Wainwright (1963) 372 U.S. 335, Geders v. United States (1976) 425 U.S. 80, Herring v. New York (1975) 422 U.S. 853, Glasser v. United States (1942) 315 U.S. 60, Powell v. Alabama (1932) 287 U.S. 45, Holloway v. Arkansas (1978) 435 U.S. 475.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals is consistent with the past decisions of this Court and its concern that an indigent and inarticulate and uneducated defendant have counsel at trial, and it reaffirms this right while allowing the trial court to take into consideration the concerns of the Court in the orderly administration of justice. The Petition for Writ of Certiorari should be denied.

Dated: February 25, 1982

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By Michael B. Bassi
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Petitioner's Brief

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No. 81-1095

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment entitle a criminal defendant to demand continued representation by a particular deputy public defender who had represented him in the pretrial proceedings?

2. If it does, is a generalized complaint on the morning of trial that successor counsel is not prepared sufficient to inform the state trial judge that previous counsel is being demanded?

3. If a state trial judge refuses to honor a demand to delay trial until preferred counsel becomes available, must there be a reversal *per se*, or must the defendant show prejudice?

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No. 81-1095

IN THE SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

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On Writ of Certiorari to
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for the Ninth Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeal is reported at 649 F.2d 718 and is attached as Appendix A to the petition for writ of certiorari. The order of the Court of Appeal amending its opinion,

denying the petition for rehearing and rejecting the suggestion for rehearing en banc is attached to the petition as Appendix B. The opinion at 649 F.2d 718 now includes the amendments.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 29, 1981. The order of the Court of Appeals amending its opinion, denying the petition for rehearing and rejecting the suggestion for rehearing en banc was filed on October 19, 1981. The petition for writ of certiorari was timely filed on December 11, 1981. Certiorari was granted on March 29, 1982. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions,

the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Respondent Joseph D. Slappy was charged in San Francisco Superior Court with committing rape, forcible oral copulation, burglary, robbery and false imprisonment.[1] The San Francisco

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1. In its opinion affirming his conviction, the California Court of Appeal summarized the facts relating to Slappy's crimes as follows:

> "Appellant accosted the victim in a liquor store and was ordered by the manager to leave. When the victim later left the store, she saw that appellant was waiting outside. She got free from him briefly but when she entered her apartment nearby, appellant was waiting in the lobby. Appellant forced her into the basement of the building, where he committed the offenses mentioned above.
>
> "Finally, the victim escaped from appellant. She

(Footnote continued on next page.)

Public Defender's Office was appointed to represent him.

On the first day of trial, Thursday, September 23, 1976, Slappy complained that Bruce Hotchkiss, the Deputy Public Defender assigned to the case, had not had sufficient time to prepare (JA 7-9). Specifically, he asserted that Hotchkiss had only had the case for a day and a half (JA 7-8). Hotchkiss denied this. He said he had had the case for six days and was fully prepared. The trial judge

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Footnote 1 continued:

> immediately gave a description of appellant to the police. Appellant was captured two blocks away. Earrings and other jewelry belonging to the victim were found on his person."

Exhibit C, attached to Petition for Writ of Certiorari, at C-1 to C-2. See also Kwaitkowski v. Superior Trading Co. (1981) 123 Cal.App.3d 324, 176 Cal.Rptr. 620 (victim's suit against owner of her apartment).

denied Slappy's request for a continuance (JA 9).

The case had been transferred to Hotchkiss because Deputy Public Defender Harvey Goldfine, who had handled the preliminary hearing and investigation, was in the hospital following an operation for appendicitis (JA 10-12). Slappy said that he was "satisfied with the Public Defender," but was concerned whether Hotchkiss was adequately prepared (JA 12). He made no reference of any kind to Goldfine. Specifically, he did not intimate in any way that he would prefer Goldfine to Hotchkiss.[2/]

On Friday, September 24, the second day of trial, Slappy repeated his

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2. During an outburst later that day, Slappy again complained about the length of time Hotchkiss had been assigned to the case (JA 14). As before, he made no reference to Goldfine.

complaint that Hotchkiss had not had time to prepare (JA 16-17). The judge stated that he had known Hotchkiss as a deputy public defender for over nine years and accepted Hotchkiss' assurances that he was prepared (JA 17-19). Once more, Slappy claimed that Hothckiss had only had the case for a day and a half, and therefore, in Slappy's opinion, could not be prepared (JA 19-20). In response, Hotchkiss again reviewed his preparation for trial, which included interviews with Slappy, familiarization with the voluminous office investigation, and preparation for cross-examination of the prosecution witnesses. He noted that he had met with Slappy on the previous Friday when the case was assigned to him, again for three hours on Tuesday afternoon, and twice on Wednesday (JA 21-23).

Following Hotchkiss' statement Slappy mentioned Goldfine's name for the first

time, stating merely "Mr. Harvey Goldfine was my attorney, and he still is." Slappy then repeated his claim that Hotchkiss had not had time to prepare (JA 24-25).[3/] The judge said that because of the weekend and other court commitments on Monday, the case would be continued for three days until the following Tuesday. He urged Slappy to cooperate with Hotchkiss (JA 25-28).

On Tuesday, September 28, 1976, eleven days after Hotchkiss had been assigned to represent Slappy, trial resumed. Slappy now took the position that he did not have counsel because his attorney was in the hospital (JA 29, 32, 37-38). He said that he would not participate in the trial, and asked to be

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3. In response to Slappy's statement Hotchkiss noted that he had visited the scene and discussed it with his client. Slappy accused Hotchkiss of lying (JA 27).

excused from the courtroom (JA 34-36). Rejecting advice from both the judge and Hotchkiss, Slappy persisted in his refusal to cooperate (JA 33, 3639).[4/] Slappy was convicted of robbery, burglary and false imprisonment, but no verdict was reached on the other offenses.

The sex charges were retried on October 7, 1976. Slappy again refused to cooperate with Hotchkiss. He would not take the stand to testify despite repeated pleas from his attorney that he do so (JA 50-52). His behavior in court ranged from making noises and improperly speaking out in front of the jury, to apparently sleeping through the proceedings (JA 49). As in the first trial, Hotchkiss described for the record the

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4. Despite his numerous threats to return to his cell and not participate in the trial, Slappy chose rather to remain in court, occasionally disrupting the proceedings with outbursts and complaints (See, e.g., JA 40-41).

extent of his preparation and attempts to persuade Slappy to cooperate with him (JA 44-45). Slappy was convicted of rape and forcible oral copulation.

Slappy's convictions were affirmed by the California Court of Appeal in an unpublished opinion filed on January 25, 1978. The California Supreme Court denied hearing.

On April 12, 1978, Slappy filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, alleging a violation of his right to counsel under the Sixth Amendment to the United States Constitution. The petition was denied, and a judgment of dismissal was entered, on December 7, 1978. (The memorandum and order of the district judge is unpublished, and is attached as Appendix D to the petition.

The judgment of dismissal is attached as Appendix E.)

Slappy appealed to the United States Court of Appeals for the Ninth Circuit. In an opinion filed on June 29, 1981, that court concluded that Slappy had been deprived of his right to counsel and found the error to be reversible per se (Petition, Appendix A). The opinion was amended on October 19, 1981 (Petition, Appendix B) when rehearing was denied.

SUMMARY OF ARGUMENT

When Deputy Goldfine, who handled pretrial proceedings, was hospitalized with appendicitis, the San Francisco Public Defender's Office assigned Deputy Hotchkiss to defend indigent Joseph Slappy, accused of burglary, robbery, rape, forcible oral copulation and false imprisonment. After his initial claims that Hotchkiss was not prepared were disproved, Slappy asserted on the third day

of trial that only Goldfine was acceptable to him. Despite this and other disruptions, Slappy was convicted of robbery, burglary and false imprisonment. At his second trial, represented by Hotchkiss, he was convicted of the sex offenses.

Slappy's attacks on his convictions were unsuccessful until the Ninth Circuit panel constructed a new aspect of the right to counsel, namely the right of continued representation. Disregarding the state court's finding of fact, the panel perceived Slappy's first day comments questioning Hotchkiss' preparedness as assertions of a constitutionally recognized preference for Goldfine. The denial of this newly conceived right, the panel decided, could only be remedied by reversal per se.

The Sixth Amendment to the United States Constitution requires that a

state provide indigent criminal defendants with competent and prepared trial counsel solely dedicated to the client's interest. It does not entitle a criminal defendant to the services of any particular deputy public defender. The Ninth Circuit panel's proposed new right of continuous representation by the deputy first appointed normally bears upon a criminal defendant's perception of, and thus confidence in, the fairness of the criminal justice system rather than upon any actual substantive component of fairness. As such, its effect is upon acquiescence in and acceptance of the result, rather than having an effect on the result itself. This new concept was formulated without any consideration of its impact upon either the prevalent, tiered organization of many defender offices or the calendars of already heavily burdened state criminal courts.

It is an unnecessary and ill-considered interference with state criminal justice systems.

Moreover, in this case the federal court not only disregarded the state trial court's finding of fact, but also, misreading the record, constructed its own contrary findings that Slappy had made a timely assertion of this new right. It then faulted the state trial judge because he had not perceived the true nature of Slappy's complaints. The federal court thus failed to give mandated deference to the state trial court's findings.

Finally, the Ninth Circuit compounded its errors by ordering reversal per se whenever its newly promulgated right is denied. This sweeping remedy is not tailored to the supposed wrong suffered. Where experienced and competent counsel is provided, at the very least some

prejudice, other than self-engendered conflicts, must be shown from the loss of continued representation before reversal is warranted.

This case is a graphic example of what can happen when a manipulative state criminal defendant meets an activist federal court. We ask this Court to remind the Ninth Circuit that remedies should be tailored to wrongs, mandate that due deference be given to state court findings, repudiate this newly perceived right to continuous representation and affirm the state court judgments of conviction.

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ARGUMENT

I

THE SIXTH AMENDMENT DOES NOT ENTITLE A CRIMINAL DEFENDANT TO DEMAND CONTINUED REPRESENTATION BY A PARTICULAR DEPUTY PUBLIC DEFENDER WHO HAD REPRESENTED HIM IN PRETRIAL PROCEEDINGS.

The Ninth Circuit Court of Appeals concluded that respondent Joseph Slappy "was deprived of his Sixth Amendment right to counsel." Slappy v. Morris (9th Cir. 1981) 649 F.2d 718, 719. After finding that the right to counsel includes "the right to a meaningful attorney-client relationship" [Id. at 720], the court held that the state trial judge in Slappy's case failed to accord due weight to that relationship by not inquiring into how long the deputy public defender who had represented Slappy earlier in the proceedings

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would be unavailable. Id. at 721-722.[5/]

The Ninth Circuit opinion required no showing of dissatisfaction by Slappy with Hotchkiss, but instead transformed Slappy's eventual identification of his first attorney into an assertion of a special relationship of trust and confidence with that attorney. It thus effectively guarantees that a simple request for previous counsel will entitle a criminal defendant to the continued services of the deputy public defender first assigned to represent him. We submit that the Sixth Amendment does not mandate continuous representation of indigent defendants by a single deputy public defender. The Ninth Circuit's new rule unduly interferes with the allocation of their resources by state public

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5. As will be shown in Argument II, the Ninth Circuit erred in concluding that this was the thrust of by Slappy's initial complaints to the judge.

defender offices, thus reducing their effectiveness, and impedes the prompt and efficient administration of justice in state courts.

The Sixth Amendment guarantees to every criminal defendant whose conviction might result in incarceration the right to have counsel appointed to represent him. Gideon v. Wainwright (1963) 372 U.S. 335; Argersinger v. Hamlin (1972) 407 U.S. 25. Especially in large metropolitan areas, "the public defender program appear[s] to be the most utilized form of legal defense employed by defendants accused of serious crimes." Wice and Suwak, "Current Realities of Public Defender Programs: A National Survey and Analysis" 10 Crim. Law Bul. 161, 163 (1974). Just as an indigent defendant does not have an absolute right to have

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a particular attorney appointed,[6] those courts which have considered the issue agree that a defendant may not insist upon representation by a particular deputy public defender.[7] Although it acknowledged this widely accepted rule, the Ninth Circuit sought to justify its contrary result by suggesting that representation of counsel is "without substance" if a defendant does not have "confidence" in his attorney. 649 F.2d at 720.

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6. United States v. Vargas-Martinez (9th Cir. 1978) 569 F.2d 1102, 1104; United States v. Poulack (1st Cir. 1977) 556 F.2d 83, 86. See generally, Annotation, "Indigent Accused's Right to Choose Particular Counsel Appointed to Assist Him," 66 ALR3d 996. See also United States v. Kitchen (5th Cir. 1979) 592 F.2d 900, 903 (retained counsel).

7. See, People v. Stroble (1951) 36 Cal.2d 615, 226 P.2d 330; Maynes v. People (1972) 178 Colo. 188, 495 P.2d 551; People v. Cox (1961) 22 Ill.2d 534, 177 N.E.2d 211.

We do not dispute the desirability of rapport with counsel,[8] but that factor alone does not entitle a defendant to insist upon continuous representation by a single deputy public defender. The cases in which this Court has found Sixth Amendment violations have generally involved one of two situations: either the defendant was not represented by counsel[9] or some judicial action prevented counsel from being

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8. There is evidence that the warmth of the attorney-client relationship may not be as important to defendants as the Ninth Circuit supposes. In a study of defendants' attitudes towards attorneys, rapport with their counsel was only rated fourth among important attributes, with "talks up in court" being the most important value. O'Brien et al., "The Criminal Lawyer: The Defendant's Perspective" 5 Am. J. Crim. Law 283, 295-297 (1977). Simply put, criminal defendants appear to want a "mouthpiece," not a confidant.

9. See, e.g., Gideon v. Wainwright (1963) 372 U.S. 335.

fully effective.[10] Neither situation is present in this case. Slappy did have experienced counsel at trial who was fully prepared and ready to defend him. That attorney's competence has never been challenged by Slappy.

Perhaps even more importantly, there was no judicial action which prevented Slappy's counsel from effectively representing him. It was the public defender's office, not the trial court, which reassigned the case to Deputy Hotchkiss, and it was Slappy himself who ultimately refused to cooperate with Hotchkiss in the presentation of his defense.

Last term this Court noted that its purpose in Sixth Amendment cases is "to

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10. See, e.g., Geders v. United States (1976) 425 U.S. 80 (prohibiting consultation); Herring v. New York (1975) 422 U.S. 853 (prohibiting summation).

assure the defendant the effective assistance of counsel and a fair trial." United States v. Morrison (1981) 449 U.S. 361, 365. Only where an infringement upon the right to counsel "has had or threatens some adverse impact upon the effectiveness of counsel's representation or has provided some clear prejudice to the defense" will a remedy be fashioned. Id. A similar analysis is appropriate when making the initial determination whether a defendant's right to counsel has been violated. The substitution prior to trial of a deputy public defender who has represented a defendant earlier in pretrial proceedings in and of itself is not the type of action which threatens the effectiveness of trial counsel's representation, nor is it likely to otherwise prejudice the

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defendant.[11]

We do not suggest by this argument that an indigent who is dissatisfied with his appointed attorney, be it private counsel or a deputy public defender, has no remedy available to him. In California, at a minimum, indigent criminal defendants must be permitted to explain on the record the reasons for their complaints about assigned counsel. People v. Marsden (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44.[12] Some federal courts have developed similar

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11. See, e.g., Greenfield v. Gunn (9th Cir. 1977) 556 F.2d 935; Moore v. United States (3rd Cir. 1970) 432 F.2d 730; Nettleton v. State (Del. 1974) 320 A.2d 743; People v. Cummings (1978) 84 Mich.App. 509, 269 N.W.2d 658, 660.

12. California takes this rule seriously. Once stated, an indigent defendant's concerns must be adequately explored. See People v. Hidalgo (1978) 22 Cal.3d 826, 150 Cal.Rptr. 788, 587 P.2d 230; People v. Lewis (1978) 20 Cal.3d 496, 143 Cal.Rptr. 138, 573 P.2d 40.

rules. See, e.g., United States v. Calabro (2nd Cir. 1972) 467 F.2d 973, cert. denied 410 U.S. 926 (1973).[13] If a defendant making such a complaint demonstrates good cause for substitution of counsel, he may be entitled to another attorney. Such a showing may include a genuine breakdown in communications between counsel and client. Even so, he still does not have a right to demand a particular attorney.

One reason for such rules is to give trial judges an adequate basis for assessing the defendant's complaints

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13. We do not concede that a hearing of this type is constitutionally mandated. The development of procedures by which indigent criminal defendants can express their objections to or complaints about assigned counsel are best left to the responsible courts. Federal appellate judges, we suggest, should limit their experimentation with such hearings to the federal trial courts.

about his attorney.[14/] Equally important, however, is the opportunity such a hearing provides for the defendant to have a sense of participation in the proceedings, and the satisfaction of having the judge's decision explained to him. See People v. Chavez (1980) 26 Cal.3d 334, 347, n. 3, 161 Cal.Rptr. 762, 605 P.2d 401. There can be no doubt from even the most cursory examination of the record in this case that Slappy was given every opportunity to state and explain his complaints about Hotchkiss. That Slappy may have been dissatisfied with the result of the hearings or the outcome of the trial is not the judge's fault, but a reflection of Slappy's contemptuous attitude toward the proceedings.

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14. "Ineffective assistance of counsel is the underlying plank which supports the Marsden rule." People v. Maese (1980) 105 Cal.App.3d 710, 723, 164 Cal.Rptr. 485. See n. 12, supra.

The interpretation of the Sixth Amendment developed by the Ninth Circuit is not only legally faulty, it also undermines the operation of public defender offices and needlessly encumbers the administration of state trial courts. Such unreasoned federal intrusion into the allocation of scarce state resources is unnecessary and unjustifiable.

Though a public defender system of providing legal assistance for indigent criminal defendants has existed in different parts of the United States since the early twentieth century,[15] this Court's decisions on the right to counsel have greatly expanded the number of such offices, as well as the scope of

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15. See Note, "Representation of Indigents in California - A Field Study of the Public Defender and Assigned Counsel Systems," 13 Stan.L.Rev. 522, 530 (1961).

those already in existence.[16/] In order to serve an increased number of clients, many offices have established some form of "horizontal" or "tiered" system for assigning deputies to particular cases.[17/] When discussing the San Francisco Public

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16. See generally, Wice and Suwak, "Current Realities of Public Defender Programs: A National Survey and Analysis" 10 Crim. Law Bul. 161 (1974).

17. See, e.g., Gilboy and Schmidt, "Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants" 70 J. Crim. Law and Criminology 1, 7 (1979); Portman, "Public Defender Office Administration" 29 Legal Aid Briefcase 107, 111-112 (1971) [Sheldon Portman is the Public Defender of Santa Clara County, California]; Wice and Suwak, supra, 10 Crim. Law Bul. at 172-173; Note, "Client Services in a Defender Organization: The Philadelphia Experience" 117 U.Penn.L.Rev. 448, 451, n. 12. The San Francisco Public Defender's Office has developed a hybrid system of horizontal representation in the majority of cases, with continuous representation by a single deputy in some cases. See, ABT Associates, Inc., The San Francisco Public Defender's Office: A Preliminary Assessment, August 8, 1980. (This document was not widely circulated. A copy will be provided should the Court so request.)

Defender's Office, the Ninth Circuit itself noted that "horizontal representation may at times be an inevitable result of workload and budget constraints imposed on a public defender's office." Greenfield v. Gunn (9th Cir. 1977) 556 F.2d 935, 938, cert. denied 434 U.S. 928 (1977). Similarly, the Delaware Supreme Court has recognized that "last minute assignments among deputies" may be required "by reasons of exigencies" in the public defender's office. Nettleton v. State (Del. 1974) 320 A.2d 743, 745.

There are three basic advantages to the tiered system. First, it is the most efficient means of representing the maximum number of clients by a limited number of deputies. Second, it allows each deputy to maintain a reasonable caseload. Third, and perhaps most important, it allows the public defender's

office to use its most experienced deputies to try cases. By holding that a defendant represented by the public defender's office may demand, and is entitled to, continuous representation by a single deputy public defender, the Ninth Circuit substantially disrupts the organization of many defender offices. The rule greatly restricts, if not eliminates, the option of using a tiered structure and will inexorably result in increased expenditure of limited state and local funds in order to continue effective representation for indigent clients.[18/] Such a potentially major impact upon the resources of the state criminal justice system should be

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18. A rule requiring continuous representation upon demand must certainly be seen as an even greater threat to disrupt public defender offices than a rule of separate counsel on demand. See Holloway v. Arkansas (1978) 435 U.S. 475, 494, n. 2 (Justice Powell, dissenting).

considered when developing new constitutional rights.[19] See Faretta v. California (1975) 422 U.S. 806, 845 (Chief Justice Burger, dissenting); Argersinger v. Hamlin (1972) 407 U.S. 25, 65 (Justice Powell, concurring in the result). The Ninth Circuit failed

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19. The potential impact of the Ninth Circuit's opinion is illustrated by the conflict between it and the decision of the California Supreme Court in People v. Johnson (1980) 26 Cal.3d 557, 162 Cal.Rptr. 431, 606 P.2d 738. In Johnson, the Court held that the congested calendar of a deputy public defender does not justify continuances which result in a denial of a defendant's constitutional and (in California) statutory right to a speedy trial. Thus a state trial judge faced with a defendant who demands not only that the deputy public defender who represented him earlier continue to do so, but also that his case go to trial immediately despite the attorney's prior commitments, may find himself between the Scylla of the Ninth Circuit's Slappy rule and the Charybdis of California's Johnson rule.

to undertake such an assessment.[20]

The Ninth Circuit's holding also raises serious problems with respect to the administration of state criminal trial courts. Calendar control "is a sophisticated operation." United States ex rel Carey v. Rundle (3rd Cir. 1969) 409 F.2d 1210, 1214. It is concern for a balance between the defendant's right to representation by counsel and society's interest in reasonable and orderly trial procedures which has led many courts to narrowly limit the ability of an indigent to substitute appointed counsel.[21] This

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20. Rejection of the Ninth Circuit's rule is consistent with the concern for public defender programs expressed by the Court earlier this term in Polk County v. Dodson (1981) ___ U.S. ___, 70 L.Ed.2d 509, 102 S.Ct. 445.

21. See, e.g., United States v. Burton (D.C. Cir. 1978) 584 F.2d 485, 490; United States v. Poulack (1st Cir. 1977) 556 F.2d 83, 86; Giacalone v. Lucas (6th Cir. 1971) 445 F.2d 1238, 1240; Moore v. Jamieson (1973) 451 Pa. 299, 306 A.2d 283, 288.

Court has "impliedly recognized the necessity for preserving society's interest in the administration of criminal justice" in cases involving Sixth Amendment rights. United States v. Morrison (1981) 449 U.S. 361, 364. By granting criminal defendants the right to insist upon continuous representation by a single deputy public defender, the Ninth Circuit has grieviously impaired state trial courts' ability to control their criminal calendars. If a defendant insists upon substitution of counsel, not only may his case be delayed while awaiting his first attorney's availability, other cases handled by that attorney may well also be delayed. Meanwhile, the judge, court personnel and newly assigned deputy also stand idly by, wasting scarce judicial resources.

Since a defendant need not show dissatisfaction, prejudice or lack of

preparedness by the new deputy, but only a desire to continue the earlier attorney-client relationship, many trial judges may feel obliged to indulge the defendant in every case, except when the continuance would be lengthy. If even half of the public defender cases were delayed for even one to two days each, the disruption and consequent cost in the state courts could well be substantial.

The Ninth Circuit's creation of a "right" of continuous representation is not only inconsistent with this Court's interpretation of the Sixth Amendment, it is a revolutionary and unnecessary step in the development of the right to counsel. A fair balance between the rights of defendants and society's interest in the allocation of its limited legal resources and the administration of justice militates against the Ninth Circuit's position. Respondent Joseph

Slappy was given the services of a competent, experienced, prepared deputy public defender at his trial. He was entitled to no less, but just as certainly he was entitled to no more.

II

THE NINTH CIRCUIT'S CONCLUSION THAT SLAPPY'S INITIAL COMPLAINTS WERE A DEMAND FOR CONTINUOUS REPRESENTATION BY A SINGLE DEPUTY PUBLIC DEFENDER MISCONSTRUES THE RECORD AND FAILS TO ACCORD THE REQUIRED PRESUMPTION OF CORRECTNESS TO THE STATE COURT FINDINGS.

We submit that the Ninth Circuit misread the record with respect to Slappy's initial complaints about Deputy Public Defender Hotchkiss. In addition, that court failed to apply the required presumption of correctness to the state judge's factual findings on the nature of Slappy's objections.

On the first day of trial Slappy complained that Hotchkiss, the deputy public defender assigned to represent

him, had not had sufficient time to prepare (JA 7-9). Slappy insisted that Hotchkiss had only had the case for a day and a half, but counsel contradicted that claim. In fact, Hotchkiss had been assigned to represent Slappy six days earlier[22/] because Deputy Public Defender Goldfine was in the hospital recovering from an appendectomy (JA 10-12). Hotchkiss assured the judge that "a further continuance would not benefit me in presenting the case," and said that he was ready to begin (JA 11). Slappy said he was "satisfied with the Public Defender," but reiterated his assertion that Hotchkiss was not prepared (JA 12).

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22. Actually, Hotchkiss had interviewed Slappy when first assigned the case on Friday, September 17, 1976. The trial judge properly accepted his representations. See Holloway v. Arkansas (1978) 435 U.S. 475, 486 and n. 9. This finding of fact casts extreme doubt on the credibility of Slappy's subsequent assertions.

The state trial judge found that Hotchkiss was a competent attorney, had had sufficient time to prepare and was ready to begin trial that day (JA 9). Contrary to the Ninth Circuit's assertion in its opinicn (649 F.2d at 720), at no time on the first day of trial did Slappy seek a continuance in order that Goldfine, rather than Hotchkiss, could represent him. The Ninth Circuit's "finding of fact" is not only totally unsupported in the record, it is contrary to the state trial court's findings that this indigent criminal defendant was represented by an experienced and prepared member of an office with which he had openly expressed satisfaction.

Whenever the merits of a state judge's factual findings are challenged in federal court, those findings "shall be presumed to be correct" unless one of seven conditions is found to exist by

the federal court. 28 U.S.C. 2254(d). If a federal court concludes that any one of the conditions was present, or that the state findings were not fairly supported by the record, it should include the reasoning which led to that conclusion in its opinion. Sumner v. Mata (1981) 449 U.S. 539, 551. The Ninth Circuit failed to comply with these obligations.

The Ninth Circuit seems to have based its factual findings on references to events in the record which did not occur until the second and third day of trial. Indeed, the only support offered by the Ninth Circuit to demonstrate Slappy's demand for continuous representation by Goldfine did not occur until the third day of the trial, eleven days after Hotchkiss had been assigned to represent Slappy. (Compare 649 F.2d at 719, n. 1 with JA 156-157.) Until that

day, with the exception of a brief reference to Goldfine as his attorney on the second day of trial (JA 24), Slappy's demands and complaints all involved his asserted belief that Hotchkiss was not, or could not have been, prepared for the trial.

There is nothing in Slappy's statements or behavior on the first day of trial to suggest that he wanted Goldfine, rather than Hotchkiss, to represent him. The only reference to Goldfine on the first day was made incidently by Hotchkiss during his explanation for the change in deputies and description of his own preparation for trial (JA 10-12). The record thus clearly demonstrates that Slappy was not requesting a continuance until Goldfine recovered from his operation, but until Hotchkiss was prepared for trial. The state judge took Slappy's complaints to

mean this; he could not reasonably have done otherwise. In its unseemly haste to place its new gloss on the Sixth Amendment right to counsel, the Ninth Circuit simply ignored its duty to defer to the state trial court's findings of fact.[23/]

The Ninth Circuit's findings are both contrary to the state trial court's findings of fact and unsupported by the

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23. Contrary to the Ninth Circuit's amendment to its opinion, we have always contended that Slappy was acting in bad faith when he demanded that Goldfine rather than Hotchkiss represent him. 649 F.2d at 722. Indeed, the fact that Slappy continued to insist that Hotchkiss had had inadequate time to prepare despite counsel's representations to the contrary, and his continuous modification of his complaints every time one was rejected, suggests that he was "motivated by a desire to delay his trial for an improper purpose" [Id.], rather than simply asserting his sincere desire for representation by Goldfine. A defendant is not entitled to manipulate the important right to counsel for the purpose of disrupting trial proceedings. United States v. Fowler (5th Cir. 1979) 605 F.2d 181, 183; United States v. White (8th Cir. 1976) 529 F.2d 1390, 1393.

state trial court record on which they purport to rely. For these reasons alone, we ask this Court to reverse outright the Ninth Circuit's decision.

III

WHERE AN INDIGENT CRIMINAL DEFENDANT CLAIMS ERROR BECAUSE A PREFERRED ATTORNEY WAS NOT APPOINTED AS TRIAL COUNSEL, HE MUST DEMONSTRATE PREJUDICE BEFORE REVERSAL IS WARRANTED.

The Ninth Circuit concluded that the perceived failure adequately to consider Slappy's attorney-client relationship with Goldfine before ruling on his continuance request constituted a denial of Slappy's right to counsel. The court's remedy was to reverse the convictions without requiring a showing of prejudice. Slappy v. Morris, supra, 649 F.2d at 723. To reach this result the Ninth Circuit relied upon a series of counsel

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cases decided by this Court.[24/] We submit that the Ninth Circuit's proposed rule fails to consider the variety of interests protected by the Sixth Amendment, and the differing remedies appropriate when those interests are violated. In cases such as Slappy's, we will show that a demonstration of prejudice should be required.

The cases defining the Sixth Amendment right to counsel present a continuum. United States v. DeCoster (D.C. Cir. 1979) 624 F.2d 196, 201 (DeCoster III). At one extreme are situations in which the defendant was denied any representation by counsel. Such an absolute

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24. Gideon v. Wainwright (1963) 372 U.S. 335; Geders v. United States (1976) 425 U.S. 80; Herring v. New York (1975) 422 U.S. 853; Glasser v. United States (1942) 315 U.S. 60; Powell v. Alabama (1932) 287 U.S. 45; Holloway v. Arkansas (1978) 435 U.S. 475.

denial demands a reversal per se.[25] Also, since a necessary corollary of the right to have counsel present is a reasonable opportunity to employ and consult with an attorney, failure to provide such an opportunity must result in an automatic reversal.[26]

When a defendant has counsel, but some judicial action prevents the attorney from being fully effective, a reversal has been required.[27] It is frequently impossible in such cases to assess the degree of harm to the defendant, because what the attorney does or

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25. Gideon v. Wainwright (1963) 372 U.S. 335.

26. Chandler v. Fretag (1954) 348 U.S. 3, 10.

27. See, e.g., Geders v. United States (1976) 425 U.S. 80 (prohibiting consultation with defendant); Herring v. New York (1975) 422 U.S. 853 (prohibiting final summation); Powell v. Alabama (1932) 287 U.S. 45 (prohibiting adequate opportunity to confer with defendant and prepare).

does not do is not readily apparent on the record or occurs when no record is made. Cooper v. Fitzharris (9th Cir. 1978) 586 F.2d 1325, 1332. Similarly, where an attorney represents multiple defendants whose interests conflict, any of those defendants may demand separate counsel. After a proper showing of such a conflict of interest, denial of the request requires automatic reversal of a conviction.[28]

Further along the continuum is belated appointment of counsel, an issue considered by this Court in Chambers v. Maroney (1970) 399 U.S. 42. There the defendant was represented by a Legal Aid Society, a member of whose staff appeared at proceedings which resulted in a mistrial. A few minutes before the second

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28. Holloway v. Arkansas (1978) 435 U.S. 475; Glasser v. United States (1942) 315 U.S. 60.

trial another attorney from the Legal Aid Society introduced himself to the defendant, and represented him in the trial. There was no claim that the second attorney's representation was incompetent. 399 U.S. at 53. The Court held that while appointments of counsel should be made as early as possible, a per se rule of reversal was not appropriate. Rather, an evidentiary hearing should be conducted to determine whether the defendant had been denied his right to counsel. Id. at 54. Based on the state court record in Chambers, a federal court of appeals concluded that the defendant had not been prejudiced, and denied an evidentiary hearing. This Court upheld that determination. Id. at

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53-54.[29]

At the other extreme of the counsel continuum are cases in which the defendant is represented by an attorney appointed in a timely fashion whose actions are unrestricted by any state action, but whose competence in handling the case is challenged by the defendant. This Court has made it clear that all that defendants are entitled to is "the effective assistance of counsel."[30] The Court has indicated, for example, that a guilty plea based on advice of counsel will only be reversed on proof of "serious derelictions on the part of counsel. . . ."

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29. This conclusion was foreshadowed by Avery v. Alabama (1940) 308 U.S. 444, where the Court held after a review of the trial record that denial of a continuance request by defense counsel did not deprive the defendant of "the assistance of zealous and earnest counsel. . . ." Id. at 450.

30. McMann v. Richardson (1970) 397 U.S. 759, 771.

McMann v. Richardson (1970) 397 U.S. 759, 774. Accord Tollett v. Henderson (1973) 411 U.S. 258, 266-267. In United States v. Morrison (1981) 449 U.S. 361, 365 this Court specifically noted that "certain violations of the right to counsel may be disregarded as harmless error." Lower courts have generally required that prejudice be established before reversing a defendant's conviction based upon claims that his counsel's representation was ineffective. See generally, Cooper v. Fitzharris, supra, 586 F.2d at 1331-1333 and n. 11.

From the above discussion, it appears that "not all the variations of the right to counsel theme are absolute values." Gandy v. State of Alabama (5th Cir. 1978) 569 F.2d 318, 323. Assuming arguendo that an indigent defendant has some right to insist upon continuous

representation by a single deputy public defender, the issue is where on the continuum to place that right, in order to assess the effect of its denial and the remedy appropriate.

Clearly, a defendant who is assigned a different but equally competent deputy public defender at trial from the one who represented him in the pretrial proceedings is not denied the assistance of counsel. Similarly, it cannot be said that the courts have in some fashion interfered with the ability of his counsel to effectively represent him, since the reassignment of deputies is by the public defender, not by the courts. Thus, this Court's denial of counsel cases (See fn. 27, supra) relied upon by the Ninth Circuit panel to establish a rule of automatic reversal in Slappy are obviously inapposite. Indeed, the Ninth Circuit sitting en banc distinguished

those same cases when holding that prejudice must be shown where a defendant's counsel erred at trial. Cooper v. Fitzharris, supra, 586 F.2d at 1332.

The appropriate test on appeal in cases involving change of counsel should be to require a demonstration by the defendant that he was prejudiced because he did not receive effective assistance of counsel at trial. Such a rule would be consistent with this Court's refusal in Chambers v. Maroney, supra, 399 U.S. at 54 to fashion a per se rule of reversal in cases involving late appointment of counsel. A similar approach was recently adopted by the California Supreme Court.

In People v. Chavez (1980) 26 Cal.3d 334, 161 Cal.Rptr. 762, 605 P.2d 401 attorney Ingber was appointed by the municipal court judge to represent the indigent defendant at his preliminary

hearing. 26 Cal.3d at 340. During arraignment in superior court after defendant was held to answer, the judge indicated that he was going to appoint private counsel to represent defendant. Though defendant stated that attorney Ingber was willing to represent him at trial, the judge appointed attorney Cowell. Id. at 341.

The State Supreme Court held that the trial court had abused its discretion by not allowing the defendant to explain why he preferred to be represented by Ingber. Id. at 347-348. It then found that error to be nonprejudicial, in part because there was no showing that substitute counsel's representation was ineffective. Id. at 348-349. The California court specifically refused to fashion a per se rule of reversal whenever a judge failed to give the defendant an adequate opportunity to state his preference for

a particular attorney or object to a change of counsel. Id.[31/]

People v. Chavez provides an appropriate model for cases involving denial of a request for continuous representation by a single deputy public defender. Indeed, at least one court has held that substitution of deputy public defenders in such a way that the client's defenses are not adequately explored, or he is otherwise deprived of effective assistance, could result in a finding that

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31. In Harris v. Superior Court (1977) 19 Cal.3d 786, 140 Cal.Rptr. 318, 567 P.2d 750 the California court held that under some circumstances denial of an indigent's request for appointment of particular counsel would be an abuse of discretion. The State Supreme Court has since explained that an error in failure to appoint preferred counsel, correctable in a pretrial situation such as Harris, would result in reversal after judgment only upon a showing of prejudice, as in People v. Chavez. People v. Pompa-Ortiz (1980) 27 Cal.3d 519, 529, 165 Cal.Rptr. 51, 612 P.2d 941.

defendant was denied his right to counsel. United States ex rel Thomas v. Zelker (S.D.N.Y. 1971) 332 F.Supp. 595.[32] Such a rule is also consistent with the requirement of many federal[33]

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32. Compare, People v. DeLosa (1960) 184 Cal.App.2d 681, 7 Cal.Rptr. 753. There denial of a continuance after substitution of San Francisco public defenders on the day of trial was not an abuse of discretion since the record disclosed that defendant was "most ably and energetically defended by his appointed counsel." 184 Cal.App.2d at 684.

33. See, e.g., United States v. Sellers (8th Cir. 1979) 603 F.2d 53; United States v. Poulack (1st Cir. 1977) 556 F.2d 83; United States v. Joyce (2nd Cir. 1976) 542 F.2d 158; Williams v. United States (7th Cir. 1964) 332 F.2d 36. This approach is not unanimous. [See Grady v. State of Alabama (5th Cir. 1978) 569 F.2d 1318], nor is it always followed consistently within the circuits. Compare, Giacalone v. Lucas (6th Cir. 1971) 445 F.2d 1238 with United States v. Johnston (6th Cir. 1963) 318 F.2d 288, and Majeske v. United States (9th Cir. 1959) 266 F.2d 947 with Releford v. United States (9th Cir. 1961) 288 F.2d 298.

and state[34/] courts that a defendant whose counsel is replaced over his objection must demonstrate prejudice before his conviction will be reversed.

The Ninth Circuit's conclusion that the trial judge erred because he "failed to inquire as to the probable length of Goldfine's unavailability" [649 F.2d at 721] does not compel a different result. As discussed in Argument I, supra, the purpose of rules requiring that the defendant be allowed to state his objections to appointed counsel is in part to provide him with a feeling of participation and involvement in the proceedings.

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34. See, e.g., State v. Torres (1973) 54 Haw. 502, 510 P.2d 494; Williamson v. State (Okl. Crim. App. 1975) 532 P.2d 444; Miller v. State (Tex. Crim. App. 1976) 537 S.W.2d 725. Some states do have an automatic reversal rule. See, e.g., Davis v. State (1974) 292 Ala. 210, 291 So.2d 346; Long v. State (1969) 119 Ga.App. 82, 166 S.E.2d 365; Mulkovich v. State (1976) 73 Wis.2d 469, 243 N.W.2d 198.

That interest, as important as it may be, is not substantial enough to warrant an automatic reversal of cases whenever a defendant is precluded from making a complete statement. California places great value on allowing the defendant to make a record. [See People v. Marsden (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 and discussion of this case in Argument I, supra.] Even so, denial of that right is not reversible per se, but requires the reviewing court to assess prejudice. People v. Marsden, supra, 2 Cal.3d at 126. See also People v. Chavez, supra, 26 Cal.3d at 348-349.35/

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35. We recognize that in some cases the absence of a record which reflects the defendant's objections to substitute counsel might render an appellate court's attempts to determine prejudice little more than "unguided speculation." Holloway v. Arkansas (1978) 435 U.S.

(Footnote continued on next page.)

Among the factors to be considered in determining whether a defendant was prejudiced by the reassignment of deputy public defenders are the amount of time the substitute deputy had to prepare, the complexity of the case, the extent of investigation by the first attorney or public defender office and the substitute deputy's access to it, the trial deputy's own statements on his preparation and readiness for trial, the degree of cooperation between the deputy and defendant and the reasonableness of any

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Footnote 35 continued:

475, 491. Though such cases may apparently be reversed per se, it is not because the defendant's "right" to continuous representation was denied, but because the effect of that denial cannot be determined. Given the complete record of Slappy's complaints, his attorney's responses to them, and the trial court's handling of the matter, the effect of deputy substitution in this case can be fully assessed without resorting to speculation.

refusal by the defendant to cooperate with the trial deputy.[36] When these factors are considered in Slappy's case, it is clear that he was not prejudiced.

Despite Slappy's assertions to the contrary, the record demonstrates that Hotchkiss did have enough time to prepare. He was familiar with the investigation of the case and pronounced himself ready (JA 10-12). Hotchkiss met with his client four times and proceeded along the lines of defense outlined to him by Slappy (JA 21-23, 34). Though Slappy ultimately refused to cooperate with Hotchkiss, it appears that he did so solely to disrupt the proceedings and

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36. This is not offered as an exhaustive list, but merely an example of the considerations which could be taken into account when reviewing such cases.

make a record for appeal.[37] Indeed, Slappy's insistence that Goldfine represent him did not emerge until the third day of trial after his other tactics had failed. It should also be emphasized that Slappy has never alleged that Hotchkiss' representation at trial was ineffective. Assuming arguendo that Slappy's Sixth Amendment rights were somehow violated, nothing in this record justifies reversal of his conviction.

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37. The record demonstrates, for example, that Slappy sought to use his refusal to testify as an attempt to gain sympathy from the jury. In his first trial Slappy stood up in court when the jury returned from deliberations to hear testimony reread and told the jurors, "there's two sides to every story" and "you haven't heard my side at all" (RT 189-190, Exhibit B attached to Return filed in the District Court). At his second trial, Slappy waited until the jury was being sent out to deliberate and then stood up in court and asked, "to take the witness stand" (ART 24, Exhibit D attached to Return filed in the District Court). The judge in the second trial found that Slappy had acted "purposely" in an attempt to affect the jury's deliberations (JA 53).

In United States v. Morrison, supra, 449 U.S. at 364 this Court emphasized that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injuries suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Moreover, this Court has refused to assume that counties which hire public defenders to satisfy the State's obligations under Gideon v. Wainwright, supra, will attempt to control the attorneys' actions in a manner inconsistent with the principles of Gideon. Polk County v. Dodson (1981) ___ U.S. ___, 70 L.Ed.2d 509, 519, 102 S.Ct. 445, 452. The absence of any showing that Joseph Slappy was prejudiced by the assignment of Bruce Hotchkiss to represent him at trial, combined with the total failure to consider the competing interests, compels reversal of the Ninth

Circuit and affirmance of Slappy's state court convictions.

CONCLUSION

Petitioner respectfully requests that the judgment of the Court of Appeals be reversed.

DATED: May 21, 1982

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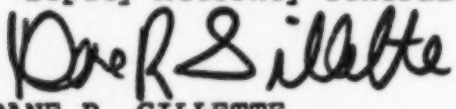

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No. 81-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN PAUL MORRIS, WARDEN,

Petitioner,

v.

JOSEPH D. SLAPPY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. When ruling on a request for continuance, did the trial court's failure to consider the established attorney-client relationship between the respondent and the attorney that had been appointed to represent him violate the respondent's Sixth Amendment right to counsel?

II. Is a federal court required to pay deference to state court findings when ruling upon an issue of federal constitutional law?

III. Is reversal *per se* fairly tailored to the wrong and does it balance the competing interests of respondent and the people when there is a violation of the right to counsel?

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STATEMENT

Respondent was charged in San Francisco Superior Court with committing five felonies. The court appointed the San Francisco Public Defender's Office to represent him. Deputy Public Defender Harvey Goldfine represented respondent at the preliminary hearing, did voluminous investigation, prepared the case for trial and was scheduled to try the case. (J.A. 11-12, 18) Respondent accepted the representation by the Public Defender's Office and considered Goldfine to be his attorney. (J.A. 12, 24, 29, 32, 38, 41)

The case was transferred to Deputy Public Defender Bruce Hotchkiss six days before the trial because Goldfine was hospitalized with appendicitis. (J.A. 10-12, 21)

Respondent rejected Hotchkiss for several reasons—first, Goldfine was his lawyer (J.A. 14, 24, 29, 38, 41); second, although Hotchkiss was assigned the case six days before trial, he first met with Slappy one and one-half days before the trial because he was too busy to keep the appointments he previously scheduled with the respondent (J.A. 7-8, 24); third, Slappy aiso objected to Hotchkiss because he had not visited the scene of the crime; fourth, Hotchkiss had not discussed with nor prepared Slappy for direct or cross-examination (J.A. 27, 32); and finally, Slappy thought that Hotchkiss was unprepared. (J.A. 7-8, 12, 17-18, 20, 24)

On the first day of trial, the trial judge voiced his concern about Hotchkiss' preparation and readiness to go to trial. He held some off-the-record discussions with the district attorney and Hotchkiss about the status of the case. (J.A. 8-9)

Slappy told the court that Hotchkiss had been on the case a day and a half and that he was not prepared. Respondent

said ". . . I want this case presented properly, this case, now this present case, this is the case I am interested in." (J.A. 7-8) The court considered this to be a request for a continuance, made no further inquiry, and denied the request. The court was satisfied by assurances from the district attorney and Hotchkiss and from its examination of the preliminary hearing transcript that an able and adequate defense could be presented. (J.A. 9)

During the first day of trial, Slappy interrupted the trial to make objections and insisted he had no counsel. (J.A. 13-14)

On the second day of trial, Slappy asked for permission to address the court. Respondent said ". . . , I don't have representation here, I am not qualified to represent myself, and I need counsel." (J.A. 17) The court told Slappy that it personally knew Hotchkiss, and that based upon the representations of Hotchkiss and the court's observations of Hotchkiss during the trial, it was satisfied with the representation by Hotchkiss. (J.A. 17-19) Slappy insisted that Goldfine was his attorney and that Hotchkiss wasn't prepared. (J.A. 24) Slappy stated, ". . . but now Mr. Harvey Goldfine was my attorney, he was my attorney and he still is." (J.A. 24) The court urged Slappy to cooperate with Hotchkiss and Slappy wondered aloud if Hotchkiss was for him or against him. (J.A. 26) Slappy and Hotchkiss then had a heated discussion about whether Hotchkiss had visited the scene of the crime and whether he discussed the scene with Slappy. (J.A. 27) Sometime on the second day of trial, the relationship between Slappy and Hotchkiss became so strained that Hotchkiss told respondent that he had a constitutional right to represent himself. (J.A. 30)

On the third day of trial, respondent filed a Writ of Habeas Corpus against the trial court claiming that his attorney was in the hospital, that he had no attorney and that Hotchkiss

had said to him that he had no defense to the charges. (J.A. 29) The court treated the request to be a renewal of Slappy's original motion for a continuance made on the first day of trial. The judge told Slappy that ". . . there appears to be nothing new added . . . ." He said the case was well prepared and that his defense involved his credibility. The court urged Slappy to cooperate with Hotchkiss. Once again he denied the motion. (J.A. 30-31) Respondent repeated his complaint that he had no counsel and that his attorney was in the hospital. (J.A. 32) Hotchkiss told the court that Slappy's testimony was essential to his theory of the defense. He told the court that Slappy was not cooperating with him. (J.A. 32-33) Slappy and Hotchkiss then had a short, sharp exchange concerning representations made by Hotchkiss to Slappy about his chances of a successful defense. (J.A. 34) Slappy asked to be removed from the trial. (J.A. 34) The court warned Slappy about the consequences of absenting himself from the proceedings. (J.A. 36-37) Slappy again said his attorney was in the hospital, that his ". . . attorney's name is P. D. Goldfine, Harvey Goldfine . . ." and requested to be removed from the proceedings. Hotchkiss urged Slappy to testify but respondent refused. (J.A. 40) Respondent remained in the courtroom. (Reporter's Transcript of September 24, 1976 *et seq.*, 188)

Respondent was convicted of burglary, robbery and false imprisonment. The jury could not agree on the rape and oral copulation charges and a mistrial was declared. The two charges were tried a week later with Hotchkiss appearing for Slappy. Respondent was convicted of the remaining two charges. (J.A. 1, 43)

Respondent accepts Petitioner's statement of the case from this point onward.

SUMMARY OF ARGUMENT

Once an attorney has been appointed by the court to represent a criminal defendant and an attorney-client relationship is established, the court may not, over the defendant's objections, arbitrarily replace defense counsel because this action denies the criminal defendant the fundamental Sixth Amendment right to counsel. The right to counsel by necessity encompasses a meaningful attorney-client relationship. It excludes token representation.

Once the attorney-client relationship has been established, there is no compelling reason to distinguish between a criminal defendant represented by a privately retained attorney and one whose attorney has been provided by the State.

The attorney-client relationship is unique. Its fundamental purpose is to foster communication, trust and confidence between the attorney and the client. The Sixth Amendment right to counsel cannot be distinguished from a meaningful attorney-client relationship. The right to counsel encompasses a meaningful attorney-client relationship which provides the foundation for adequate legal representation.

The attorney initially appointed to represent a defendant should do so throughout the proceedings. Continuity of representation maintains the attorney-client relationship and provides the occasion for it to develop. It will avoid the infringements upon the right to counsel that occur with severance of the attorney-client relationship and which lead to hostility, distrust and ineffective assistance of counsel.

The Sixth Amendment right to counsel is not absolute. The trial court must weigh the right to a meaningful relationship with counsel at trial against the countervailing,

legitimate interest of society in maintaining the prompt and efficient administration of justice. In this case it did not.

The trial court's failure to consider respondent's established attorney-client relationship with counsel and to ascertain whether there were any countervailing societal interests which might justify interference with the attorney-client relationship violated respondent's right to counsel.

In reviewing a habeas corpus claim by a state prisoner, a federal court reviews the state court's application of federal constitutional law. The Ninth Circuit found fault with the failure of the trial court to apply the appropriate constitutional standard and engage in the proper balancing. The Ninth Circuit did not make an independent interpretation of the facts nor reweigh the credibility of the witnesses. Because the decision was based upon an issue of law, the Ninth Circuit had no obligation to defer to state court findings.

Contrary to petitioner's assertions, the record fairly indicates that respondent considered Goldfine his attorney and wanted Goldfine to represent him at trial. When Hotchkiss abandoned respondent at the point when he was asserting his right to be represented by Goldfine, respondent did the best he could with his limited ability to assert his rights.

This case concerns the denial of the right to counsel at trial. Effective assistance of counsel at trial is not the issue. This Court has long recognized the Sixth Amendment right to counsel is a fundamental right essential to a fair trial. Because the right to counsel is a fundamental right, a violation is never harmless error. When the historical importance of the Sixth Amendment right to counsel is considered against the competing interests of the people, reversal per se is the appropriate remedy.

The decision of the Ninth Circuit Court of Appeals should be affirmed because it is consistent with prior decisions of this Court recognizing that the Sixth Amendment right to counsel is fundamental and how important it is to the adversary factfinding process of the criminal justice system.

ARGUMENT

I. WHEN RULING ON A REQUEST FOR A CONTINUANCE, THE TRIAL COURT'S FAILURE TO CONSIDER THE ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE RESPONDENT AND THE ATTORNEY THAT HAD BEEN APPOINTED TO REPRESENT HIM VIOLATED RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Criminal defendants who are financially able have the constitutional right to choose and hire their own attorney. *See, e.g., Chandler v. Fretag* (1954) 348 U.S. 3; *United States v. Cunningham* (2d Cir. 1982) 672 F.2d 1064, 1070. The trial court appoints counsel for indigent criminal defendants.[1] Although they do not ordinarily have the right to demand that a particular attorney be appointed to represent them,[2] once the attorney-client relationship has been established, there is no reason to distinguish between a

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[1]*See, California Penal Code* § §987(a), 987.2(a) (Deerings 1982); *California Government Code* §27700 et seq., (Deerings 1982) *People v. Chavez* (1980) 26 Cal. 3d 334, 344, 605 P.2d 401.407.

[2]*But see Harris v. Superior Court* (1979) 19 Cal.3d 786, 567 P.2d 750.

criminal defendant who has privately retained his counsel and one who is represented by a public defender. *See Culyer v. Sullivan* (1980) 446 U.S. 335, 344-45 and n. 9; *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-62, 440 P.2d 65, 74; *Cf., Polk County v. Dodson* (1981) ____ U.S. ____, 70 L.Ed.2d 509, 518 and n. 11, 102 S.Ct. 445, 451 and n. 11.

"A defendant is not lightly to be deprived of the counsel of his choice." *United States v. Smith* (4th Cir. 1981) 653 F.2d 126, 128; *Maxwell v. Superior Court* (1982) 30 Cal.3d 605, 615; 639 P.2d 248, 252-53, 258-59.[3]

The right to counsel necessarily involves the cooperation and interaction of both defendant and his counsel to facilitate the investigation and preparation of the case against charges which may ultimately result in a loss of liberty.[4] The burden of pre-trial and trial preparation rests upon both defendant and his attorney. Restrictions that interfere in the interaction

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[3]*See, Linton v. Perini* (6th Cir. 1981) 656 F.2d 207, 209; *United States v. Laura* (3rd Cir. 1979) 607 F.2d 52, 56; *United States v. Seale* (7th Cir. 1972) 461 F.2d 345, 358; *Cf., United States v. Vargas-Martinez* (9th Cir. 1978) 569 F.2d 1102, 1104 (conflict of interest); *United States v. Cunningham* (2d Cir. 1982) 672 F.2d 1064, 1070 (conflict of interest); *United States v. Agosto* (8th Cir. 1982) 675 F.2d 965, 969 (conflict of interest); *Commonwealth v. Connor* (1980 Mass.) 410 N.E.2d 709, 911 (conflict of interest); *State v. White* (1981) 53 Or. App. 856, 632 P.2d 1363, 1366 (conflict of interest).

[4]*See,* Casper, *American Criminal Justice: The Defendant's Perspective,* 100-25 (1972) in which the author suggests the perception that the public defender is indistinguishable from the district attorney and the lack of choice and of financial exchange contributes greatly to distrust of public defenders and a feeling by defendants that they are being processed by a system rather than receiving justice. Alpert, "Effective Assistance of Counsel: The Exchange Theory," 17 *Crim. Bull.,* 381, 394-401 (1981); Tague, "An Indigent's Right to the Attorney of His Choice," 27 *Stan. L. Rev.* 73, 80-84 (1974).

between attorney and defendant and which affect pretrial and trial preparation and consultation during trial have been invalidated.[5]

"Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."[6] As the Ninth Circuit recognized:

> The attorney-client relationship involves 'an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney.' Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered. At the very least, an open exchange between attorney and client will often foreclose the possibility of surprise at trial. *McKinnon v. State* (1974 Alaska) 526 P.2d 18, 22.[7]

Trust, confidence and interaction between the attorney and client is essential to the establishment of a meaningful,

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[5]*See, e.g., Geders v. United States* (1976) 425 U.S. 80, 88 (consultation during trial); *Hawk v. Olson* (1945) 326 U.S. 271, 276-78 (consultation after indictment); *Ex Parte Rider* (1920) 50 Cal.App. 799, 195 P. 965 (consultation while incarcerated); *Turner v. State* (1922), 91 Tex. Crim. 627, 241 S.W. 162, 163 (consultation while incarcerated).

[6]*ABA Standards for Criminal Justice, The Defense function,* Standard 4-3.1, Commentary, 4-28 to 30 (1980).

[7]*See also Smith v. Superior Court* (1968) 68 Cal.2d 547, 440 P.2d 65, 68; *Lee v. United States* (D.C. 1976) 235 F.2d 219, 221 n. 5, *United States v. Mitchell* (2d Cir. 1943) 137 F.2d 1006, 1012, (Frank, J., Dissenting); Golde, "Interviewing the Client: Initial Steps," *Continuing Education of the State Bar of California, California Criminal Law Practice,* §§3.1-3.2, 109-10 (1969).

substantive attorney-client relationship. Without trust and reliance, the client will withhold essential information and the attorney will not have sufficient data on which to act appropriately. The attorney will labor in a vacuum and the client will have counsel in form only. But, when a meaningful, substantive attorney-client relationship is established, the attorney will provide assured and confident advice and the client may act accordingly, knowing he can rely upon the advice.

Thus, the right to counsel is not satisfied merely by the appointment of a reputable member of the bar and must encompass a meaningful attorney-client relationship. *See, Powell v. Alabama* (1932) 287 U.S. 45, 68-69, 71; *Avery v. Alabama* (1939) 308 U.S. 444, 446: *Gideon v. Wainwright* (1963) 372 U.S. 335, 344-45; *McMann v. Richardson* (1970) 397 U.S. 759, 771; *Cooper v. Fitzharris* (1978) 586 F.2d 1325, 1328-1329.

The attorney-client privilege shields communications between attorney and client. Its creation, whether by legislatures or the courts, acknowledges the special character and importance of the attorney-client relationship.[8] This Court has not been willing to narrow the scope of the attorney-client privilege in civil law situations because it recognized how important communication is to an attorney so he can give "sound and informed advice." *Upjohn v. United States* (1981) 449 U.S. 383, 390-392 (Communications between corporate general counsel and corporate employees).

The attorney-client relationship is so important that a court cannot force counsel upon a defendant who knowingly

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[8] *See Baird v. Koerner* (9th Cir. 1960) 279 F.2d 623, 629-30; See also J. Weinstein & M. Berger, 2 *Weinstein's Evidence* 503[02] (1979); 8 Wigmore, *Evidence* §2291 (1961).

and intelligently waives counsel and insists upon proceeding *pro se. Faretta v. California* (1975) 422 U.S. 806, 820-821, 834.

The attorney-client relationship has an historical and substantive importance to the right to counsel. It is the basis for the effective representation of the defendant. Both case law and legislative enactments recognize that the right to counsel, particularly in the criminal justice system, would be meaningless without trust and interaction between the defendant and his attorney both before and during trial.

Respondent submits that the Sixth Amendment right to counsel encompasses a meaningful, substantive, attorney-client relationship.

The attorney who initially represents a criminal defendant should continue to do so throughout the proceedings. Continuity of representation maintains a meaningful attorney-client relationship.[9] "Attorneys are not fungible as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, or the importance they give to particular legal issues." *United States v. Laura, supra,* 607 F.2d at 56. And the decisions of an attorney may affect other constitutional rights. *See, e.g., Wainwright v. Sykes* (1977) 433 U.S. 72; *Stone v. Powell* (1976) 428 U.S. 465.[10]

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[9]*See, The ABA Standards for Criminal Justice, Providing Defense Services,* Standards 5-5.2, 5-5.3, 5-53 to 58 (1980); *United States v. Laura, supra,* 607 F.2d at 56-57.

[10]Continuity of counsel avoids the following occurrences which infringe upon the right to counsel: work is fragmented among lawyers and their work is often uncoordinated; communication of information from initial lawyer to successor lawyer may not occur; successor counsel and client must duplicate work with re-interviews, reconsideration of documents and reconstruction of the history of the case; objective information such as off-the-record conversations and untranscribed proceedings cannot be effectively communicated; subjective in-

(continued)

Respondent does not argue that the Sixth Amendment right to counsel is an absolute right which mandates continued representation notwithstanding other legitimate and competing interests of society. The Sixth Amendment right to counsel, the purpose of which is to provide fairness and justice in the adversary system, cannot be used to impair and frustrate those goals. *See, e.g., United States v. Burton* (D.C. Cir. 1978) 584 F.2d 485, 489, cert. denied, 439 U.S. 1069 (1979), *Gandy v. Alabama* (5th Cir. 1978) 569 F.2d 1318, 1321, *Cf., Lakeside v. Oregon* (1978) 435 U.S. 333, 341.

Not every request for a continuance to provide continuity of counsel will be granted. When one defendant, however, asks for a continuance under circumstances such as those presented here, the court must at a minimum inquire into the reasons set forth by the defendant, assess the nature of his established attorney-client relationship and balance it against society's countervailing interests. The nature and

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(footnote continued from preceding page)

formation, such as witness' demeanor, prosecutorial attitudes and visual impressions, are not passed from one attorney to the other; lack of continuity may result in a failure to prepare a portion or all of the case; breaks in legal representation may occur between withdrawal and appointment, leaving the defendant without counsel at a critical stage of his case; and if defendant feels like an "object to be processed" he may react hostiley and uncooperatively and may lose confidence in his counsel. *See* Gilboy and Schmidt, "Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants," 70 *Jour. of Crim. L. and Crimin.* 1 (1979).

See Tyler, "Competent and/or Effective: How Breakdowns Occur", 33 *NLADA Briefcase; Moore v. United States* (3rd Cir. 1970) 432 F.2d 730, 736; *Greenfield v. Gunn* (9th Cir. 1977) 556 F.2d 935, 938 *cert. denied,* 434 U.S. 928 (1977); *United States ex rel. Thomas v. Zelker* (S.D.N.Y. 1971) 332 F.Supp. 595.

extent of Slappy's relationship with Goldfine, the length of Goldfine's unavailability, and the inconvenience to prosecution and its witnesses which a continuance would entail, are all factors the court could and should have inquired into in determining whether preserving respondent's attorney-client relationship with Goldfine was outweighed by the need to have the trial proceed.[11]

Respondent was represented by Goldfine at the preliminary hearing. Although he had not seen Goldfine for five weeks, it was Goldfine who directed the voluminous investigation, who prepared the case and who was originally to try the case. (J.A. 11, 12, 21, 24) Slappy said that Goldfine was his attorney. (J.A. 24, 29, 32, 38, 41) "The record clearly establishes the fact that Slappy and Goldfine had entered into an attorney-client relationship at least as of the time of the preliminary hearing." *Slappy v. Morris,* (9th Cir. 1981) 649 F.2d 718, 720.

The failure of the trial court judge to consider respondent's established attorney-client relationship with Goldfine and accord it any weight when ruling upon the request for a continuance infringed upon respondent's attorney-client relationship with Goldfine and violated his right to counsel. The trial court's error was its failure to recognize the Sixth Amendment dimension to Slappy's request for a continuance. The record reflects that the trial judge was not concerned with the established relationship between respondent and his attorney, Goldfine. The trial court focused upon the work previously done by Goldfine evidenced in the preliminary hearing transcript, the judge's personal knowledge of the quality of attorneys Goldfine and Hotchkiss, and Hotchkiss' assertion that he was prepared to proceed and

[11]As to the other factors a court might consider when ruling on a request for continued representation by a particular attorney. *See, e.g., United States v. Burton, supra,* 584 F.2d at 491; *Gandy v. State of Alabama, supra,* 569 F.2d at 1320.

that a continuance would be of no benefit to his handling of the case (J.A. 9, 11-13)[12] The trial court completely failed to consider respondent's relationship with Goldfine and the anticipated length of the requested delay. (J.A. 7-13)

When the established attorney-client relationship is given the proper constitutional consideration[13] in the exercise of judicial discretion and the defendant is allowed to properly make his record, the court's decision will be overturned only for an abuse of discretion.[14]

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[12]The record indicates there had been some off-the-record conversation between the trial judge, the District Attorney and Hotchkiss which suggests the court had some concerns about the preparation of the case and the readiness of Hotchkiss. (J.A. 8). As to the reliability Hotchkiss' assertions about his preparedness, *See People v. McKenzie* (1982) 130 Cal. App. 3d 73, ____ P.2d ____ , (Hrg. granted, May 20, 1982, California Supreme Court, Crim. No. 22615) This case is not cited for a point of law but to demonstrate that respondent's complaints were genuine.

[13]A trial court may be confronted by requests from the defendant involving related but different matters. For example, rejection of a particular attorney may invoke claims of conflict and/or ineffective assistance of counsel and a request for new counsel. *See, e.g., Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170. Depending upon what facts are presented as the basis for the request, the court may have to advise the defendant he has the option of proceeding with original counsel or *pro se*. *See, e.g., McKee v. Harris* (2d Cir. 1981) 649 F.2d 927. A request for a continuance may also have to be ruled upon. The issues may overlap. The trial judge must make the proper inquiry in each area so as not to violate the rights of the defendant. *See generally Gandy v. State of Alabama, supra,* 569 F.2d at 1324 n. 10, *accord, see generally United States v. Uptain* (5th Cir. 1976) 531 F.2d 1281.

[14]*Compare, e.g., Linton v. Perini, supra,* 656 F.2d 207 and *United States v. Johnston* (6th Cir. 1971) 318 F.2d 288 and *Argo v. Wiman* (N.D.Ala. 1962) 209 F.Supp. 299, 302, *aff'd.* 308 F.2d 674, *cert. denied* 371 U.S. 933 with *United States v. Poulack* (1st Cir. 1977) 556 F.2d 83, 86 and *Giacalone v. Lucas* (6th Cir. 1971) 445 F.2d 1238, 1243. *But, cf., United States v. Hobson* (11th Cir. 1982) 672 F.2d 825, 828-29 (In attorney disqualification matters, "clearly

(continued)

Petitioner's claim that continuity of counsel will disrupt public defender systems is speculation and ignores the ethical and legal obligations of individual public defenders representing indigent criminal defendants. The preferred structure of a particular system of delivery of legal services to the poor should not be considered for the first time on appeal.[15] *Moore v. United States* (1970) 432 F.2d 730, 736. No one system is preferred. The obligation of a public defender is to provide effective legal representation. *Polk County v. Dodson* (1981) ____ U.S. ____, 70 L.Ed.2d 509, 518, 102 S.Ct. 445, 451; *Moore v. United States, supra,* 432 F.2d at 736. Once an attorney-client relationship with the defendant is established with a public defender, it is not subject to the administrative pressures and concerns of the public defender's office. *Polk County v. Dodson, supra,* 70 L.Ed.2d at 518 and n. 11, 102 S.Ct. at 451 and n. 11.

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erroneous" standard adopted as more protective of defendant's Sixth Amendment right).

One benefit to the reviewing court is that if there has been no abuse of discretion then the right to counsel has been provided. It need then only review Sixth Amendment claims under the effective assistance - harmless error of standard of *Chambers v. Maroney* (1970) 399 U.S. 42. *Compare Holloway v. Arkansas, 1978,* 435 U.S., 476, 487-87 with *Culyer v. Sullivan, supra,* 446 U.S. at 345.

[15]Consideration of a case is limited to the questions specifically in the Petition. *General Talking Pictures Corp. v. Western Electric Co.* (1937) 304 U.S. 175, 176-79; *J-R Distributors, Inc. et al. v. Washington* (1974) 418 U.S. 949, 950 *(cert. denied)* (White, J.). The questions in the Petition must arise from the record below. *Tyrell v. District of Columbia* (1916) 243 U.S. 1, 4-6. The Ninth Circuit opinion does not discuss a preferred system of legal services for indigents. *See Slappy v. Morris* (9th Cir. 1981) 649 F.2d 718. The questions presented are not concerned with the type of delivery of legal services, and the issue of "horizontal" versus "vertical" representation of indigents is not identical to or subsumed within any of the questions presented. *Compare Peters v. Kiff* (1971) 407 U.S. 493, 495.

The right to counsel is a fundamental right. It should not be eroded because of the unsubstantiated claims of economic hardship. Petitioner's argument simply is an appeal to economics at the expense of principle—an argument which this court has rejected. *See Argersinger v. Hamlin* (1972) 407 U.S. 25.

II. A FEDERAL COURT IS NOT REQUIRED TO PAY DEFERENCE TO STATE COURT FINDINGS WHEN RULING UPON ISSUES OF FEDERAL CONSTITUTIONAL LAW.

The federal habeas reviewing court is not bound by the presumption of correctness of issues of fact when it considers an issue of federal constitutional law. *Culyer v. Sullivan* (1980) 446 U.S. 335, 341; *Cf. Brewer v. Williams* (1977) 430 U.S. 387, 401-03. ". . . [T]he federal habeas petitioner who claims he is detained pursuant to a final judgment in a state court is entitled to have the federal habeas court make its own independent determination of the federal claim, ..." *Wainwright v. Sykes* (1977) 433 U.S. 72, 87; *Brown v. Allen* (1953) 344 U.S. 443.

The constraints of *Sumner v. Mata* (1981) 449 U.S. 539, cited by Petitioner, concern issues of federalism and the respect to be accorded state court findings when being reviewed by federal courts. The congressional mandate of *28 U.S.C. §2254(d)* and the admonitions of *Sumner* are not applicable when a federal court pursuant to a habeas corpus petition reviews the application of federal constitutional law by a state trial court. *See Culyer v. Sullivan, supra,* 446 U.S. at 341-42; *Cf., Brewer v. Williams, supra,* 340 U.S. at 401-03.

The reasoning of *Culyer v. Sullivan* (1980) 446 U.S. 335 is controlling in this case. In resolving the issue presented for review, this Court found the "holding that the lawyers who played those roles is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." *Culyer v. Sullivan, Id.* at 341-42. In *Culyer,* the failure of the trial court to apply the proper constitutional standard to the historical facts was properly reviewable by the Ninth Circuit and it need not comply with *28 U.S.C. §2254(d)* because the finding of whether counsel undertook multiple representation was not an issue of fact. *Culyer v. Sullivan, supra,* 446 U.S. at 341 n. 5.

Slappy v. Morris, (9th Cir. 1981) 649 F.2d 718, 721-22 indicates that the Ninth Circuit found the failure of the trial judge to balance the Sixth Amendment right of respondent to a meaningful relationship with his lawyer against the needs of society in the prompt and efficient administration of justice violated the Sixth Amendment right to counsel of the respondent. The Ninth Circuit found that the trial court did not make a complete and full inquiry into the length of the unavailability of Goldfine. Because of the limited inquiry, the trial court could not have considered nor applied the proper constitutional standard. It was a failure to apply the Sixth Amendment right to counsel that was the basis for the decision of the Ninth Circuit. It was not a reconsideration of the facts.

The Ninth Circuit did not find Slappy's or Hotchkiss' version of the facts to be correct. The reviewing court would have reached the same conclusion that the trial court failed to consider the attorney-client relationship of Slappy and Goldfine whether Slappy was correct in his assertions about Hotchkiss or Hotchkiss was correct in his asserted preparedness. The Ninth Circuit did not reconsider the his-

torical facts and reweigh the credibility of the witnesses.[16] It had no obligations to presume the trial court's findings correct, and include a reference to that effect and a further reference to *28 U.S.C. §2254(d)* in its opinion. Petitioner's reliance on *Sumner v. Mata, supra,* is misplaced and the Ninth Circuit properly found as a matter of law the trial Court failed to apply the appropriate constitutional standard and "engage in the balancing required to protect defendant's rights." *Slappy v. Morris* 649 F.2d 718, 722.

Petitioner's suggestion that Slappy untimely asserted his desire to be represented by Goldfine is a narrow interpretation of the request of an indigent and uneducated criminal defendant who, when faced with a trial on five serious felonies with an attorney with whom he was not familiar and with whom he had no previous relationship and was suspicious and hostile towards, tried to bring his concerns to the attention of the trial court. Instead of focusing on the concerns of the defendant and inquiring as to the basis of the complaints, the trial Judge advised him that his lawyer was ready to proceed. (J.A. 9) When respondent indicated to the Court that he desired a continuance, Hotchkiss, instead of joining with Slappy in asserting his rights, advised the Court that a continuance would be of no benefit to him and that he felt he was prepared to proceed. (J.A. 10-12, 21-23, 32-33) The actions of Hotchkiss when respondent continued to assert his concerns to the trial Court effectively left respondent without an attorney to frame the precise basis for his request for a continuance. Rather than advising of

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[16] "The presumption of correctness of issues of fact refers to what the court has described as 'issues of fact'. By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .' " *Townsend v. Sain* (1963) 372 U.S. 293, 309 at n. 6.

Slappy's desires to be represented by Goldfine and continue the matter until Goldfine was recovered from his appendicitis and informing the court of the time needed for a continuance, Hotchkiss asserted his readiness to proceed to trial.

This Court has recognized that indigent and uneducated defendants are held to less stringent standards than attorneys. *Cf., Hughes v. Rowe* (1980) 449 U.S. 5, 9 (Civil rights complaint) and *Boag v. MacDougall* (1981) (Per Curiam) ____ U.S. ____ , 70 L.Ed.2d 551, 102 S.Ct. 700 (Complaint against department of corrections). The failure of Hotchkiss to assert Slappy's rights left an indigent and uneducated defendant without an attorney to articulate the parameters of his request. At that point Slappy was effectively and actually *pro se.* He had no attorney and was asserting, in the best manner possible, his request that Goldfine continue to represent him.

On the first day of trial when respondent brought his concerns to the attention of the trial court, respondent stated that he was satisfied with representation by the Public Defender's office (J.A. 10) but not with Hotchkiss. The record indicates Hotchkiss met briefly with respondent for the first time six days before trial to introduce himself. Hotchkiss did not keep scheduled meetings with Slappy prior to trial. He finally met with respondent one and one-half days before trial. Slappy thought Hotchkiss was unprepared. Hotchkiss did not prepare Slappy for direct and cross-examination prior to the trial, and had not visited the scene of the crime. (J.A. 8, 12, 19, 20, 22-24, 27) Because Slappy was satisfied with the Public Defender's office but dissatisfied with Hotchkiss, his request for his case to be "presented properly" was so that Goldfine who had represented him previously and who had prepared the case and who was to try his case could continue to represent him.

Hotchkiss confirmed Slappy's understandings that Goldfine was to be his trial attorney when he indicated on the first day of trial that the case was transferred to him because of the sudden illness and hospitalization of Goldfine. (J.A. 10-12) Indeed, on the third day of trial, when Slappy indicated he did not have an attorney and his attorney was in the hospital, the Court considered the claims of respondent to be a reiteration of the first day's request for a continuance. It found nothing new added to the request. (J.A. 29-30) Respondent's initial request for his case to be "presented properly" can only be considered as a request that the attorney whom he viewed as prepared, with whom he had established an attorney-client relationship, who had done voluminous investigation on the case, prepared the case and who was scheduled to try the case, represent him at trial.[17]

Respondent's inarticulate and uneducated assertions were a timely notification to the court of his request to be represented by Goldfine and the Ninth Circuit properly found that the trial Court filed to consider the established attorney-client relationship between respondent and Goldfine.

III. WHEN THERE IS A VIOLATION OF THE RIGHT TO COUNSEL, REVERSAL PER SE IS TAILORED TO THE WRONG AND FAIRLY BALANCES THE COMPETING INTEREST OF THE RESPONDENT AND THE PEOPLE.

Respondent is not claiming that the last-minute appointment of Hotchkiss denied him effective assistance of counsel.

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[17]There was no waiver of counsel. *See Johnson v. Zerbst* (1938) 304 U.S. 458; *Faretta v. California* (1975) 422 U.S. 806. Respondent was aware of his inability to represent himself and of his need for counsel (J.A. 7-8, 17, 42).

Respondent is claiming his right to counsel at trial was violated. *Compare Harling v. United States* (D.C. App. 1978) 387 A.2d 1101, 1106.

The Ninth Circuit was careful to recognize the principle of *Chambers v. Maroney* (1970) 339 U.S. 42 but found it to be inapposite because it was factually different from this case.

The claim in *Chambers* was that belated appointment of counsel resulted in *per se* ineffective assistance of counsel.[18] In *Chambers* there was no objection to the second attorney and no request that the attorney who originally tried the case and which resulted in a mistrial, retry the case. In *Chambers*, there was no request for a continuance by the defendant.

Slappy and Goldfine entered into an attorney-client relationship as early as the preliminary hearing. Respondent's case was investigated at the direction of Goldfine who was to represent Slappy at trial. Respondent stated that Goldfine was his attorney. (J.A. 12, 18, 24, 29, 38, 41) Respondent wanted to be represented by Goldfine. He objected to Hotchkiss. He sought a continuance and made a record. The Ninth Circuit properly found this case to be factually different from *Chambers v. Maroney, Id.*

This Court has held reversal *per se* to be the standard in cases involving fundamental rights which affect the integrity and the reliability of the fact finding process.[19]

"The importance of counsel's function to the effective operation of our adversary system is unquestioned." *United*

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[18]*See also Cooper v. Fitzharris, supra,* 586 F.2d at 1336 (Hufstedler, J., Dissenting)

[19]*See, generally,* Field, "Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale," 125 *U. Pa. L. Rev.* 15, 29-31 (1976); Mause, "Harmless Constitutional Error: The Implications of Chapman v. California," 53 *Minn. L. Rev.* 519, 540-43 (1969).

States v. Burton, supra, 584 F.2d at 488. An individual's decision to forego counsel must meet the exacting waiver test of *Johnson v. Zerbst* (1938) 304 U.S. 458. A waiver of counsel is effective only if it is knowing and intelligent, and any doubt about that understanding must be resolved in the defendant's favor. *Brewer v. Williams* (1977) 430 U.S. 387; *Faretta v. California* (1975) 422 U.S. 806.

Almost five decades of case law of this Court consistently affirm the principle that the Sixth Amendment right to counsel at trial is a fundamental right essential to a fair trial and a violation can never be harmless error. *Chapman v. California* (1970) 386 U.S. 18, 23; *Holloway v. Arkansas* (1978) 435 U.S. 476, 489.

A defendant who is denied the right to counsel at trial need not demonstrate prejudice. *Gideon v. Wainwright, supra,* 372 U.S. at 344-45; *Powell v. Alabama, supra,* 287 U.S. at 71. If the right to counsel is diluted by the representation of conflicting interests at trial, prejudice need not be shown. *Glasser v. United States* (1941) 315 U.S. 69, 70; *Holloway v. Arkansas, supra,* 435 U.S. at 484-86. *Per se* reversal is required when restrictions prevent counsel from fully assisting the defendant during trial. *Herring v. New York* (1975) 422 U.S. 853, 854; *Geders v. United States* (1976) 425 U.S. 80, 88-89.

This Court has also refused to speculate as to the amount of prejudice to the defendant from the denial of the right to counsel at trial. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice from its denial." *Glasser v. United States* (1941) 315 U.S. 60, 76; accord, *Holloway v. Arkansas* (1978) 435 U.S. 476, 487-90. "That, indeed was the whole point of *Gideon v. Wainwright,* 372 U.S. 335, overruling *Betts v. Brady,* 316 U.S. 455." *Chapman v. California, supra,* 386 U.S. at 43 (Stewart, J., Concurring).

The trial Court violated respondent's right to counsel by failing to recognize that respondent's attorney-client relationship with Goldfine was protected by the Sixth Amendment. When the court forced Hotchkiss upon respondent and required him to proceed to trial with Hotchkiss without inquiring into the nature and extent of the attorney-client relationship respondent established with Goldfine, it violated respondent's right to counsel.[20] The court's actions demonstrate that it had no concern with respondent's claims that Goldfine was his attorney. The court also erred because it made no inquiry into any countervailing considerations of the people which would justify the court's substitution of Goldfine. *Per se* reversal is the only remedy when such a fundamental and absolute right is infringed upon. *Linton v. Perini, supra,* 656 F.2d at 211-12; *United States v. Laura, supra,* 607 F.2d at 58; *Releford v. United States* (9th Cir. 1961) 288 F.2d 298; *Gandy v. Alabama, supra,* 569 F.2d at 1327, *United States v. Johnston* (6th Cir. 1963) 318 F.2d 288, 291 *Argo v. Wiman* (N.D. Ala. 1962) 209 F.Supp. 299, 303; *aff'd,* 308 F.2d 674; *cert. denied,* 371 U.S. 933 (1963), *See also Harling v. United States, supra,* 387 A.2d at 1106; *People v. Crovedi* (1966) 65 Cal.2d 199, 208; 417 P.2d 868, 874; *State v. Zaha* (1980) 44 Or. App. 103, 605 P.2d 306, 308.

Per se reversal is consisent and mindful of the admonition in *United States v. Morrison* (1981) 449 U.S. 361, 364:

> Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from constitutional violation and should not unnecessarily infringe upon competing interests.

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[20]By denying a continuance and forcing respondent to go to trial with Hotchkiss, the court prevented respondent from establishing an attorney-client elationship with any attorney other than Goldfine.

The government's remedy is to re-try the case.[21] *Morrison* acknowledges a re-trial of the case as the appropriate remedy for a violation of the Sixth Amendment right to counsel at trial. *United States v. Morrison, Id.,* at 364. This remedy fairly balances and recognizes the essential and fundamental nature of the right to assistance of counsel against the competing governmental interests.

Assuming, *arguendo,* that prejudice must be demonstrated by respondent, the record herein reflects clear prejudice to the respondent. The trial court's error was not harmless beyond a reasonable doubt.

The record does not support Petitioner's assertion that respondent demonstrated an intention to disrupt his trial and that the respondent was motivated by a contemptuous attitude (J.A. 24) and bad faith (J.A. 38). The implication is that respondent caused his own problems. This is incorrect. Slappy's complaints on the three days of trial focus upon his attorney and his unwillingness to cooperate with the attorney forced upon him. Indeed, it was the trial court's failure to act that forced Slappy to continue to protest which eventually culminated in a complete refusal to cooperate with his counsel. It was only on the third day of trial that the defendant completely refused to cooperate with his attorney and requested to be taken from the courtroom. Even then, he was asserting that he was denied his attorney (J.A. 29, 31-32, 38, 41). Respondent's distrust and hostility was directed towards Hotchkiss, not the trial court.[22]

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[21]*United States v. Morrison* (1981) 449 U.S. 361 is distinguishable from this case because Morrison sought a dismissal of the indictment leaving the government with no remedy.

[22]Slappy's conduct never reached the abusive and disrespectful nature of the conduct in *Illinois v. Allen* (1970) 397 U.S. 337, 339-41, but was akin to a crude but insistent, unsophisticated attempt to assert his rights

(continued)

The record indicates that Slappy's counsel felt it essential that the respondent take the witness stand since his whole theory of the case depended upon Slappy testifying. (J.A. 33, 40) The trial court indicated the case was one in which respondent's credibility was at issue. (J.A. 30-31) The success or failure of the defense depended upon the credibility of Slappy and his testimony. The trial court's refusal to accord weight to the relationship of Slappy and Goldfine resulted in Slappy's refusal to cooperate with Hotchkiss. Respondent refused to take the witness stand because his Sixth Amendment right was violated. Since the trial Court and Hotchkiss felt that the testimony of respondent was essential to the defense, it cannot be determined that Slappy's refusal to cooperate as a result of the denial of his Sixth Amendment right was "harmless error beyond a reasonable doubt." *Chapman v. California, supra,* 386 U.S. at 23.

Furthermore, to inquire whether or not there would have been any difference in the trial tactics, cross examination, presentation of witnesses and evidence, or opening and closing statements between Hotchkiss and Goldfine is mere speculation. The entire trial would have been different, including the conduct and demeanor of Slappy. Trying to assess a hypothetical result is the type of speculation which this Court will not consider when the fundamental Sixth Amendment right to counsel is violated.

(footnote continued from preceding page)

as in *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 972-76. The insertion of himself into the record was forced by the failure of the trial judge to apply the correct standard and by his counsel's failure to assert his request for a continuance. Had his counsel assisted him, the record might be devoid of the unsophisticated expressions of an uneducated layman of his rights.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be affirmed.

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Petitioner's Reply Brief

No. 81-1095

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IN THE SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1981

JOHN PAUL MORRIS, Warden,

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v.

JOSEPH SLAPPY

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I

SLAPPY FAILED TO DEMONSTRATE THAT THE PUBLIC DEFENDER'S ASSIGNMENT OF DEPUTY HOTCHKISS TO REPRESENT HIM AT TRIAL IN ANY WAY VIOLATED SLAPPY'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Respondent Joseph Slappy argues that "[o]nce an attorney has been appointed by the court to represent a criminal defendant and an attorney-client relationship is established, the court may not, over the defendant's objections arbitrarily replace defense counsel because this action denies the criminal defendant the fundamental Sixth Amendment right to counsel." Respondent's Brief at 4. Though an accurate and unobjectionable statement of the law, it does not apply to the facts of this case. It was the San Francisco Public Defender's Office, not the trial court, which assigned Deputy Bruce Hotchkiss as Slappy's trial attorney. It is the power of the public defender to make necessary changes in the assignment of deputies which is of concern here. By focusing primarily on cases dealing with court-ordered substitutions of counsel,

respondent avoids the central issue in this case.[1/]

The amicus brief filed in support of respondent by three associations of criminal defense lawyers does at least discuss the substitution of deputy public defenders, but its analysis is flawed.[2/] The attorneys contend that a court "should not permit removal or substitution of counsel shortly before trial over the objection of the client." Criminal Attorneys Brief at 14. In so arguing these amici ignore the

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1. In its amicus curiae brief in support of respondent, the National Legal Aid and Defender Association (NLADA) incorrectly states that the assignment of different deputies at different stages of the proceedings is not at issue. Its suggestion that the issue is simply whether the trial judge could remove an appointed attorney is inaccurate for the reasons stated above. See NLADA Brief at 10.

2. That brief is designated as Criminal Attorneys Brief.

inescapable fact that Goldfine was not removed as the assigned deputy, but was incapacitated because of an appendectomy, and that Hotchkiss was assigned to the case by the Public Defender six days before trial (JA 9). The record indicates that Hotchkiss was fully prepared, and met with Slappy four times before the case was called for trial (JA 10-12, 21-23).[3/] At issue then

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3. The criminal attorneys argue that Hotchkiss was "substandard" in his preparation and contact with respondent (Brief at 26, n. 21) and neglected his client (Brief at 45), based upon their apparent acceptance of Slappy's assertions and rejection of Hotchkiss' responses to them. There is an unstated but disquieting suggestion that Hotchkiss should have concurred in the request for continuance (see Brief at 30). An attorney's obligation to his client requires him to be prepared when a trial starts. By announcing ready when he was in fact ready to proceed, Hotchkiss was simply representing the best interests of his client. Moreover, defense counsel is an officer of the court and must answer truthfully when asked whether he is

(Footnote continued on next page.)

is not whether a trial court properly or improperly substituted counsel for a criminal defendant, but whether Slappy made a sufficient showing to justify judicial inquiry into the Public Defender's decision to change the assignment of his deputies.

The Ninth Circuit's decision to require a trial court to question the assignment of deputies by the Public Defender affects not only the ability of public defender offices to substitute deputies when necessary, but the basic internal structure of many such offices. Respondent claims that this issue was not discussed by the Ninth Circuit in its opinion nor raised in the

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Footnote 3 continued:

prepared. Hotchkiss was ethically bound not to mislead the court. It was not improper for him to correct Slappy's inaccurate assertions about his preparation and readiness for trial.

Petition for Certiorari, and is thus not properly before the Court. Respondent's Brief at 14. He is mistaken. The problem of public defender office organization was not a concern until the Ninth Circuit's creation of a new Sixth Amendment right. In our Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit, we vigorously argued the implications of the decision on public defenders, without objection from respondent in his reply brief. It was also discussed in the Petition for Writ of Certiorari (Petition at 9-10, 12-13), again without objection by respondent.

The NLADA also objects to any consideration of public defender office organization. NLADA Brief at 11-16. Its position relates in part to a conclusion by NLADA that the judge's failure to

exercise discretion is the central issue in this case. If Slappy's objections on the first day of trial were, in fact, sufficient to challenge the substitution of Hotchkiss for Goldfine, rather than simply questioning Hotchkiss' preparation, then the basic capacity of the Public Defender to make that assignment is of particular concern. Unless there is a Sixth Amendment right to continuous representation by a single deputy public defender, in most cases the only appropriate inquiry by the trial court, when there has been a reassignment of deputies, is whether the attorney designated for trial is prepared. That issue was fully litigated here.

NLADA next contends that a horizontal system of representation is "subject to strong criticism" (NLADA Brief at 16) and thus, apparently, not worth

protecting. Though continuous representation by a single attorney for all criminal defendants might be a laudable goal, the limited resources available to urban public defender offices precludes that luxury. Indeed, studies have shown that horizontal representation is the best available method for providing effective representation to the largest number of clients.[4/]

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4. See, e.g. Note, "Client Service In a Defender Organization: The Philadelphia Experience," 117 U.Penn.L.Rev. 448, 451 n. 12 (1969). [Assigning each case to an individual deputy "would result in an impossible load for the individual defenders, and render the representation meaningless in many circumstances"]; Wice & Suwak, "Current Realities of Public Defender Programs: A National Survey and Analysis," 10 Crim.Law Bull. 161, 172 (1974) [Horizontal representation "enables the public defender to defend a maximum number of indigents with the limited resources available"]. In an article published by NLADA itself, Sheldon Portman, the Public Defender of Santa Clara County, California, reached a

(Footnote continued on next page.)

We do not suggest that deputy public defenders are fungible, nor do we suggest that public defender offices should be able to arbitrarily reassign deputies.[5/] Rather, we simply contend that flexibility in organization and assignment is critical to enable such offices to optimally meet the exigencies of representing large numbers of indigent criminal defendants with

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Footnote 4 continued:

similar conclusion. Portman, "Public Defender Office Administration", 29 Legal Aid Briefcase 107, 11-112 (1971). He recommends assuring defendants that they will be represented by a trial specialist and are being served "by a large law firm rather than an individual attorney." Id. at 111-112.

5. Absent "pleading and proof to the contrary," it cannot be assumed that a public defender office will assign deputies in a manner inconsistent with its responsibility to provide effective assistance of counsel for indigent criminal defendants. Polk County v. Dodson (1981) ___ U.S. ___, 70 L.Ed.2d 509, 519, 102 S.Ct. 445, 452.

limited resources.[6/] Since the Ninth Circuit's ruling would eliminate that flexibility, we urge its reversal.

II

THE NINTH CIRCUIT MADE FACTUAL FINDINGS INCONSISTENT WITH THE STATE COURT RECORD AND THE SPECIFIC FINDINGS OF THE STATE TRIAL JUDGE.

We argue that the Ninth Circuit violated its responsibility to defer to State court factual findings when it concluded that Slappy initially requested a continuance so that Goldfine could represent him. Respondent contends that

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6. The criminal attorneys point to federal rules of procedure requiring continuity of appointed counsel as a guideline for determining the parameters of the Sixth Amendment right to counsel. Criminal Attorneys Brief at 31, n. 23. The difference in both numbers of clients and types of cases between state and federal public defender offices limit the usefulness of such comparisons. Neither vertical nor horizontal representation is prohibited or required, nor is one or the other preferred by the Constitution. See Brief for the United States As Amicus at 16, n. 6.

the Ninth Circuit acted properly because it was simply reviewing the application of federal constitutional law by a trial court. This argument is premised on respondent's assertion that the trial court erred by not inquiring into the length of Goldfine's unavailability.

Respondent, as well as the amici, accept the Ninth Circuit's conclusion that Slappy's statement on the first day of trial that, in his opinion, Hotchkiss was not prepared, coupled with the statement by Hotchkiss that he had been assigned to the case because Goldfine was hospitalized, should have been enough to trigger an additional inquiry by the court. See Respondent's Brief at 16-18; NLADA Brief at 3-5; Criminal Attorneys Brief at 38. These arguments are based upon two contentions, neither of which is tenable.

First, it is claimed that because he was "an indigent and uneducated criminal defendant" (Respondent's Brief at 17), Slappy's assertions about Hotchkiss' readiness for trial should be liberally construed to include a preference for Goldfine. Unlike the cases cited by respondent, both of which involve pleading causes of action,[7/] this is not a situation which requires any sophistication or knowledge of the law on the part of the criminal defendant, "but simply an expression of his own desires." United States Brief at 14-15, n. 5. Slappy was fully capable of articulating a preference for Goldfine. He demonstrated this on the third day of trial when he said that Goldfine was his attorney. (JA 29, 32, 37-38). The fact

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7. Hughes v. Rowe (1980) 449 U.S. 5; Boag v. MacDougall (1981) ___ U.S. ___, 70 L.Ed.2d 551, 102 S.Ct. 700.

that he did not mention Goldfine in his initial complaints, much less request that Goldfine continue to represent him, undermines the fundamental assumption upon which both the Ninth Circuit and Respondent rely. The state trial court took Slappy at his plain meaning. When he said Hotchkiss was not prepared, the judge inquired into that complaint and found it baseless. The court was not required to do more.

Respondent's second contention is that a trial judge is obligated to imagine every possible ramification, connotation and permutation of a defendant's statements, then ascertain whether each <u>might</u> be a basis for a general objection to trial counsel. In effect, respondent and amici, as well as the Ninth Circuit would place the burden of ascertaining and then articulating possible objections or complaints

about counsel upon the judge rather than the defendant. No case, state or federal, cited in any of the briefs filed on Respondent's behalf creates such an obligation. Indeed, this Court has specifically held that it is the reasons presented to the trial judge at the time a motion for continuance is denied which determine whether the denial was an abuse of discretion. Unger v. Sarafite (1964) 376 U.S. 575, 589-590.[8/]

The Ninth Circuit not only ignored the specific factual findings of the

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8. We note that in each of the cases cited by the Ninth Circuit to support its holding, the defendant specifically requested a continuance so that a particular attorney could continue to represent him. See Gandy v. Alabama (5th Cir. 1978) 569 F.2d 1318, 1320; United States v. Seale (7th Cir. 1972) 461 F.2d 345, 356-361; Releford v. United States (7th Cir. 1961) 288 F.2d 298, 300-301; Smith v. Superior Court (1968) 68 Cal.2d. 547, 553-554, 68 Cal.Rptr. 1, 5, 440 P.2d 65, 68-69. Nothing in Slappy's first day complaint is similar to the requests in any of these cases.

state trial judge with respect to the scope of Slappy's complaints, but misread the record so as to attribute to Slappy motives and statements not articulated until the third day of trial. By so doing the court failed in its obligation under 28 U.S.C. 2254(d) to defer to the state judge's factual conclusions. For that reason alone the Ninth Circuit should be reversed.

CONCLUSION

Petitioner respectfully requests that the judgement of the Court of Appeals be reversed.

DATED: November 15, 1982

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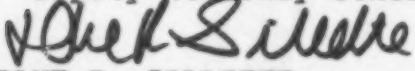

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No. 81-1095

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOHN PAUL MORRIS, Warden,

Petitioner,

v.

JOSEPH D. SLAPPY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS AMICI CURIAE ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Sixth Amendment right to the effective assistance of counsel preclude an unexplained removal of appointed counsel, a public defender, over the objection of the defendant prior to a serious felony jury trial?

2. What prejudice, if any, must be shown when originally appointed counsel is removed over objection of the defendant?

A. Does the interference with the established attorney-client relationship just prior to a felony jury trial constitute prejudice?

B. Does the defendant's failure to testify because of antagonism with substitute counsel which forecloses his only defense constitute prejudice?

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INTEREST OF AMICI CURIAE

Over one-half of all felony defendants in the United States are represented by appointed counsel.[1] In 1981, for the first time, half (53%) of all those assisted by appointed counsel in federal criminal cases were represented by attorneys on the staff of a federal public defender or federal community defender organization.[2] In California, public defender offices or equivalent programs under which private counsel are assigned have been established in every county.

[1]Benner & Neary, The Other Face of Justice Table 117 at 85 (1973). Approximately 65% of all felony defendants are represented by appointed counsel. See also Silverstein, Defense of the Poor 8-9 (1965).

[2]As of 30 June 1981, the Administrative Office of the U.S. Courts recorded 43,500 appointments of counsel under the Criminal Justice Act, of which 53% were represented by federal defenders and 47% by private panel attorneys, but there is no breakdown between felonies and misdemeanors. 1981 Annual Report of the Director 31.

Of first impression before this Court is the last-minute removal and substitution of a different attorney of the same public defender office over the incessant objection of the defendant. Each case and client are different, and the breach of this individualized relationship must now be compared against the constitutional minimum of the Sixth Amendment. Clients suspect counsel from a public defender office who are subject to court pressures to move cases along, and the sine qua non, service to the client, is severely neglected. The client has no choice of or almost no control over appointed counsel. This client-defender disability, an incident of poverty, mandates greater, not lesser judicial protection, for an attorney-client relationship once formed.

To recognize and protect the inde-

pendence of the defense lawyer and to preserve the foremost ethical obligation to the client, this Court should recognize the right of the client. To permit convenient or expeditious reassignments of counsel shortly before trial who have rendered substantial assistance and established rapport with the client denigrates both the client and recasts the lawyer as an impersonal technician. Such replacements offend the Sixth Amendment and erode respect for the courts which depend upon the zealous presentation of advocates on behalf of the parties.

The many men and women serving in defender offices throughout the United States aspire to provide quality legal representation that more than adequately satisfies the mandate of the Sixth Amendment right to counsel. A wide-

spread and mistaken impression of this organizational lawyer is that he or she serves the system first. Defendants overwhelmingly prefer to be represented by retained private counsel. Both suspects and the uninformed public have remarked, "What you receive is what you pay for. You pay nothing, you get nothing" or "I want a real lawyer, not a public defender."[3]

[3]Professor Jonathan D. Casper, Stanford University, has surveyed the widespread distrust of public defenders and has offered suggestions on how it might be reduced--not eliminated. In one recent survey, he found that the defendant in almost half (49%) of the cases thought the public defender was on the side of the state but only 6% thought that of retained counsel. Casper, Improving Defender Client Relations, 1977 NLADA Briefcase 114 (1977); J. Casper, Criminal Courts: The Defendant's Perspective 16-24, 53-59 (1978). In a trial where the deputy public defender made no opening statement, did no cross-examination, made no objections, presented no jury instructions, and made no final argument, he was characterized by his client as a "dump truck." The California court of appeal characterized the nonfeasance as a "low visibility" strategy and affirmed the conviction. People v. Huffman, 71 Cal. App. 3d 63, 139 Cal. Rptr. 264 (1977).

Because of the experience that California and federal defenders (and private defense counsel) may provide, a perspective not otherwise found in the briefs of the parties or other amici, this brief is filed.

National Association of Criminal Defense Lawyers (NACDL)

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia, nonprofit corporation whose membership is comprised of approximately 2,200 lawyers who are citizens of every state and reflect the diversity of state and federal criminal practice. The membership consists of trial and appellate advocates, law professors, and judges who are concerned with ensuring quality defense representation that ensures that professional and independent role of the defense advocate.

California Public Defenders Association

The California Public Defenders Association (CPDA) represents 52 defender organizations[4] and some 2,000 attorneys, both public defenders and private counsel. Since 1969, CPDA has articulated the views of organized defenders on legislation and public issues, and to assist the courts has filed briefs that will help provide insight on the basis and impact of a substantial legal issue on the criminal process as it relates to the delivery of defender services.

California Attorneys for Criminal Justice

California Attorneys for Criminal Justice (CACJ) is a statewide organization of 2,000 attorneys, law professors, and law students. CACJ seeks the

[4]In the fifty-eight counties in California, there are thirty-seven full-time defender offices. CPDA also includes members of the Office of State Public Defender.

preservation of constitutional and legal rights of all citizens and the protection of defense counsel in the criminal process.

STATEMENT OF THE CASE

The jury trial for rape, robbery, burglary, oral copulation, and false imprisonment started on Thursday, 23 September 1976, but the judge had been informed by the district attorney and the public defender that the case had been assigned to Mr. Hotchkiss, deputy public defender, the previous Friday. (J.A. 7-8)[5] The respondent then objected to the substitute attorney's inability to prepare because of his unexpected and recent takeover of the case. The respondent stated: "It's impossible for him to have the time enough to take care of this case to represent this case

5 "J.A." stands for Joint Appendix.

properly the way it should be represented. My life is at stake. I am the one on trial, ain't nobody to be responsible for serving the time for me, I am the one." The court responded that it had reviewed the preliminary transcript and was satisfied "that the public defender's office has very adequately represented you up to now." (J.A. 9) The respondent had been represented by Deputy Public Defender Harvey Goldfine, and the court acknowledged the case was well prepared by Harvey Goldfine. (J.A. 18) The court did feel confident from the assurances given both by Mr. Hotchkiss, the substitute deputy public defender, and the district attorney, that Mr. Hotchkiss would provide an adequate defense. (J.A. 9) Mr. Hotchkiss did state, "Mr. Goldfine did voluminous investigation in the case." (J.A. 21)

After the respondent's statement of belief of lack of preparation, Mr. Hotchkiss, the deputy public defender stated for the record that he relied upon the previous investigation and the file from Mr. Goldfine. He then mentioned that Mr. Goldfine, who was to try the case, was operated on for appendicitis and that is how it was transferred (J.A. 11-12). The respondent stated that he had not seen Mr. Goldfine in five weeks. (J.A. 19) The respondent indicated satisfaction with the public defender but indicated that there was a complete lack of preparation in the case and did not want it to be "pushed" to trial. (J.A. 12) The objections of the respondent to substitute Deputy Public Defender Hotchkiss permeated the trial. (J.A. 7-13, 13-15, 16-28, 26-39, 39-42)

In response to the respondent's criticism about the lack of investigation, Mr. Hotchkiss predicted victory, "I don't intend to lose this case, but if I do I think that [the file] ought to be opened to the Appellate Court."[6] (J.A. 22) Mr. Hotchkiss over the intervening weekend planned to review the direct and cross-examination of the defendant who was expected to testify (J.A. 22).

During the trial, the respondent questioned the substitute defense counsel's loyalty and interest in him: "He's my P.D., he's for me or against me, he's suppose to be for me." (J.A. 26).

Substitute defense counsel described the focal point of the defense: "I feel

[6]Prediction of victory and mention of appellate review for possible incompetency is patently inconsistent.

that's necessary [the defendant taking the stand], and the whole theory of Mr. Slappy's case, based upon my discussion with Mr. Slappy, the theory of his case depends and hinges greatly upon him taking the witness stand." (J.A. 33) The defendant did not testify, claiming that he was not receiving a fair trial. (J.A. 36)

Midtrial the respondent filed a writ of habeas corpus on the grounds that he had no attorney because his attorney was in the hospital. (J.A. 28-29) He said: "I don't have no attorney, I told you I don't have no attorney. My attorney's in the hospital, my attorney's name is Mr. P.D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital." The defendant then explained that Mr. Hotchkiss "told me that I didn't have no defense from my charges.

I was through then, and that's why I didn't see him when he come down to see me." (J.A. 38-39, 41) Substitute defense counsel responded to the court that this was not true and that he did have a defense. (J.A. 41)

On the charges of rape and oral copulation not resolved by the first jury trial, Mr. Hotchkiss in a second trial again represented the respondent during which the conflict between counsel and the respondent escalated. Substitute counsel stated, "I believe that communications have broken down such that I am running out of--I don't think I am of effective assistance as counsel because he has not cooperated with me. I think we have reached a situation where there is a conflict." (J.A. 44-45) After a court-suggested off-the-record discussion, counsel withdrew his

request on the grounds that a refusal to cooperate did not legally constitute a conflict. (J.A. 46-47) In the second trial, the defendant again did not testify, and the court denied his belated attempt to take the stand. (J.A. 51-53)

In the U.S. Court of Appeals for the Ninth Circuit, appointed counsel on the denial of the petition for writ of habeas corpus raised two issues: (1) the removal of counsel where there was a factual demonstration of irreconcilable conflict with the successor, and (2) the denial of the privilege of testifying at one's own trial.[7]

SUMMARY OF ARGUMENT

In satisfying the Sixth Amendment right to the assistance of counsel the public defender, like retained counsel,

[7]Opening Brief for Petitioner-Appellant 4-11, filed in the U.S. Court of Appeals for the Ninth Circuit 26 June 1979.

owes continuity of representation for the benefit of the client. Once an appointed attorney has done substantial investigation and preparation, that attorney should represent the defendant at a jury trial on serious felony charges. Absent compelling reasons carefully articulated in the record, the court should not permit removal and substitution of counsel shortly before trial over the objection of the client.

The removal of already prepared appointed counsel and last-minute substitution of counsel clearly unacceptable to the client violates the Sixth Amendment requiring a new trial. The unexplained substitution reduces the defender attorney to an impersonal cog in the system with no personal and professional obligation to the client. The client in this case suffered actual

prejudice because the client, antagonized by the substitute lawyer's lack of preparation, failed to testify and lost his critical defense.

ARGUMENT

I. COUNSEL IN A PUBLIC DEFENDER OFFICE HAS THE SAME OBLIGATION TOWARD HIS CLIENT AS RETAINED COUNSEL AND THAT RELATIONSHIP MUST BE PRESERVED ABSENT A COMPELLING SHOWING FOR REMOVAL.

A. Growth of Public Defenders

"California has fulfilled its responsibility to provide counsel for indigents largely by establishing public defender's offices." In re Williams, 1 Cal. 3d 168, 174-75, 81 Cal. Rptr. 784, 460 P.2d 984 (1969). The first public defender in criminal cases was established in Los Angeles County in 1913,[8] and today to fulfill its

[8]Smith, Justice and the Poor 117 (1919).

constitutional[9] and statutory[10] responsibilities that public defender office, the largest in the United States, has a staff of almost 400 deputy public defenders. Indeed, California pioneered in the creation of public defender offices; in 1921, the California Legislature adopted enabling legislation under which the City and County of San Francisco first opened the doors of its office that same year. Ingram v. Justice Court, 69 Cal. 2d 832, 836 n.1, 73 Cal. Rptr. 410, 447 P.2d 650 (1968); Annual Report of the San Francisco Public Defender, at 2 (15 Nov. 1980).

[9]"The defendant in a criminal case has the right . . . to have the assistance of counsel for the defendant's defense . . . ." Constitution of California, art. 1, § 15.

[10]The county public defenders of California provide a variety of statutorily imposed duties beyond the constitutionally required representation in criminal and quasi-criminal proceedings. Cal. Govt. Code § 27706.

Defender services at the local and national level are an integral part of the criminal justice system. Substantial public funds are committed to quality legal representation mandated by the Sixth Amendment.[11]

The California courts have long recognized that attorneys of the public defender office stand in the same relationship as retained attorneys to their clients.[12] In 1976, California created a State Public Defender system with a full-time attorney staff providing representation at the appellate

[11]The annual expenditure for the Los Angeles County Public Defender is approximately $30,000,000 which reflects a charge for the use office space, but an almost equal amount was paid to appointed counsel. Pursuant to The Criminal Justice Act, the annual cost for appointed counsel at the trial and appellate level, including all expert, investigative and support services, and transcript expenses, is less than $30,000,000.

[12]In re Hough, 24 Cal. 2d 522, 528-29, 150 P.2d 448 (1944).

level and in some post-conviction proceedings.[13]

California leads the nation in public defenders and treats them on a parity with prosecutors, granting both equal pay and civil service status. Although financed by county or state government, defender attorneys strive to furnish effective assistance or "the skill, judgment, or diligence of a reasonably competent attorney acting as a diligent, conscientious advocate."[14]

Although appointed counsel has long been recognized in federal criminal

[13]Cal. Govt. Code §§ 15400, et seq. The State Public Defender Office handles approximately one-half of the case load with emphasis on capital cases.

[14]Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc). This Court has not defined "effective assistance" but stated it was "within the range of competence demanded of attorneys in criminal cases." McMahon v. Richardson, 397 U.S. 759, 771 (1970).

cases,[15] in 1964 Congress passed the Criminal Justice Act, 18 U.S.C. § 3006A (Pub. L. 88-455, 78 Stat. 552 (20 Aug. 1964)), which acknowledged for the first time limited compensation for appointed counsel for those accused of federal crimes who are financially unable to employ counsel. In February 1971, pursuant to an amendment of the Criminal Justice Act (Pub. L. 91-447, 84 Stat. 916 (14 Oct. 1970)) Federal Defender Organizations were authorized. Today, there are thirty-nine Federal Defender organizations, thirty-two of which are Federal Public Defenders and seven of which are Federal Community Defender Organizations.

B. Effective Representation Requres Continuity

Choice of counsel is not the issue.

[15]Johnson v. Zerbst, 304 U.S. 458 (1938).

Harvey Goldfine, a Deputy Public Defender of the San Francisco County Public Defender Office, was the "guiding hand of counsel" assigned from the outset of the case. The respondent's express approval of the "public defender" was a measure of his satisfaction with the performance of Mr. Goldfine. The respondent never asserted a right of self-representation for he conceded his inability to properly represent himself. (J.A. 17) Like many defendants, the respondent may have had a great deal of distrust for the institutional staff attorney of a public defender office, but the respondent had developed a relationship of trust and confidence in Mr. Goldfine, his

appointed counsel.[16]

C. ABA Standards

The ABA Standards for Criminal Justice: Providing Defense Services (2d ed. 1979), in Standard 5-5.2 states: "Counsel initially provided should continue to represent the defendant throughout the trial court proceeding." The commentary to this standard avoided the question as to whether different

[16]"A defendant's acceptance and cooperation with his appointed counsel may vary in direct proportion to the defendant's image of his lawyer's independence. Whatever the true state of facts may be, there is good reason to suppose that defendants consider retained counsel more independent than assigned counsel, and as between appointed counsel or a public defender, it is the public defender whose reputation for independence is in the lowest repute. Several Criminal Justice Act panel counsel advised us that they were not accepted by their clients as long the clients thought they were full-time salaried public defenders. Only when the clients found that they were private attorneys who were being compensated in proportion to the time and effort expended in the defendants' behalf did they give their full confidence and cooperation." Dallin Oaks, The Criminal Justice Act in the Federal District Courts 146 (1969).

counsel should follow through on the appeal, but consensus was reached that the defendant should be represented by the same attorney throughout the trial court proceedings.[17] Although the standard speaks in terms of all criminal cases, such continuity may not be feasible nor constitutionally required, i.e., a misdemeanor.[18] Geographical considerations as well as jurisdiction of inferior courts may present difficulties, but in the context of a serious felony case scheduled for trial, continuity must be preserved. The

[17]The need for a "second look" to insure both objectivity and adequacy of representation is the premise for having different counsel on appeal, but there are advantages in having the same counsel who tried the case provide representation on appeal.

[18]If a jury trial was scheduled or had complex issues (i.e. antitrust), continuity of counsel should be required. Seasoned trial advocates always agree that preparation is the essence of any litigation. Skill of the attorney is not an adequate substitute.

appointed defense lawyer is disadvantaged, because trust and confidentiality is engendered slowly when the client had no say in the hiring or appointing process. The client's acceptance of the appointed advocate should be judicially encouraged, not coerced, because of the personal as well as professional role that the attorney serves. In our adversary system, the defense counsel is the binding agent of his client and serves in various capacities: (1) champion for the accused, his primary role, (2) an intermediary that interacts with the criminal justice system and provides an objective evaluation of the case, (3) a skilled advocate familiar not only with the applicable law and the facts sustaining the charge, but all the facts as related to him by the client, (4) negotiator, when necessary, and finally, (5)

a "learned friend" in which counsel is given because of the total confidence established between lawyer and the client. See ABA Standards for Criminal Justice: The Prosecution and Defense Function 145-150 (Approved Draft 1971).

The wholesome attorney-client relationship established was destroyed by the just-before-trial substitution. Personal service is the hallmark of the professional, and without rapport or at least simple acquiescence the lawyer is useless, if not counterproductive. As a partisan advisor, defense counsel will candidly appraise the facts, explain the application of the law, formulate a theory of defense, and then prepare with the cooperation of the defendant a strategy to implement those defenses. The lack of cooperation can not be attributed to the defendant, for any

substitute was unsatisfactory when forced upon him shortly before trial. A client well knows when an attorney is merely going through the motions.[19] Many judgment calls in a criminal case require the interaction of both the client and the attorney working together. Time spent together will foster this rapport. The sudden interdiction of the established relationship with a compelled acceptance of a substitute without such rapport makes a mockery of the heavy responsibility we formally allocate for the defense trial manager. The bankruptcy of rapport precluded effective representation.

[19]Many misunderstandings with counsel with adequate time may be resolved with a full explanation by counsel. The pressure of a forthcoming trial may have prevented a "venting session." The trial court acted precipitously absent the consent of the defendant to the substitute counsel.

The respondent had not criticized or questioned Mr. Goldfine's conduct or absence even though he had not seen him for five weeks, but he did protest extensively[20] the substitution of new counsel who the respondent, the client, believed did not have a defense and did not have an adequate opportunity to prepare.[21]

[20]The respondent could not have done more to protest at the time of trial the substitution of unprepared counsel. The objections came at the outset and included his filing, mid-trial, a writ of habeas corpus to preserve his record. The respondent did not create the situation--it was triggered by the substitution.

[21]This Court has yet to speak on the objective criteria for the constitutionally protected standard of "effective assistance of counsel." Supra n.14. Experienced criminal defense lawyers would agree that Mr. Goldfine, who did the investigation, should have tried the case. Given the nature of the charges and the time spent with the client before trial, the conduct of substitute counsel, in both individual preparation and establishing contact with the respondent, was substandard. The court of appeals never reached this issue because the unexplained interference with the established defense counsel-client relationship was a sufficient basis for relief.

The respondent accurately pointed out that he was on trial, and that he was entitled to the effective representation of counsel previously designated. He had not asked for Mr. Goldfine, but that was his attorney who had undertaken the preliminary hearing, a signficant stage in a criminal case in California because of the requirement of competent evidence necessary to establish probable cause, and the fact that substitute counsel recognized he had done "voluminous" investigation. The defendant's persistence in characterizing his attorney as Mr. Goldfine throughout the trial, even though inappropriately expressed on some occasions, articulated his affirmative and unequivocal desire to preserve the established relationship rather than accepting the substitute who had the imprimatur of

both the judge and the district attorney.[22] The case is distinguishable from a case where appointed counsel has done little before being relieved.

D. Prior Precedent

In Powell v. Alabama, 287 U.S. 45 (1932), this Court criticized appearance of counsel on the day for trial who had not been fully prepared even though he was acceptable to the defendants:

> In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of

[22] Many judges for the record pretrial make statements on the skill and experience of the appointed counsel in the hope that the defendant might better appreciate this professional stranger. In most cases, comments from the court only reinforce the defendant's suspicion that the attorney is a "tool of the government" and is not truly loyal to his or her interests. More experienced defense lawyers often feel that such comments at the end of a trial are the ceremonial "kiss of death," because the defense lawyer and often his client, also, know that the judge is trying to "protect the record" from a later claim of attorney incompetence.

> their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

287 U.S. 45, 57. The language in Powell emphasizes the need to meet with and discuss the case with the client:

> But in reaching that result the defendant, charged with the serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

287 U.S. 45, 59.

. . . .

> He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

287 U.S. 45, 61. Substitute defense counsel's reliance upon the previous investigation and review of the file is

completely inadequate. The need for consultation and conference with the clients is paramount if not essential in the presentation of a defense. The analogy to a confessional emphasizes the intimate and fundamental relationship that counsel must serve. Substitute counsel encountering manifest rejection of the client was as much concerned as protecting himself from the client as well as serving him. This irreconcilable conflict would have been avoided if original counsel was permitted to serve or possibly more time granted to permit substitute counsel to prepare. With short notice and hostility evident, substitute counsel's assistance was form more than substance.

The Sixth Amendment means more than an attorney serving as an officially designated legal attendant. To accept

this role is not only to denigrate the defendant's constitutional right to the assistance of counsel but also to denigrate those serving in the defender offices. The criminal justice system operates principally upon acceptance of pleas of guilty, and one of the most standard questions in that judicial inquiry is whether or not the defendant pleading guilty is satisfied with the services of his or her attorney. It would be anomalous if counsel had to be acceptable to a client for the purposes of a plea but not for the purposes of a jury trial.[23]

[23]Rule 44(a), Fed. R. Crim. P., requires continuity of appointed counsel as does the Criminal Justice Act, 18 U.S.C. § 3006A(c). These federal guidelines are helpful in determining the parameter of a constitutional right. Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (federal law used as a guide in determining right to trial by jury).

E. Removal

The court of appeals in granting relief focused on the unexplained removal of counsel. The court in assessing the unexplained interference with this essential attorney-client relationship prior to the jury trial of a serious criminal case echoed the collective wisdom of the commentators. In 1979, the ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-5.3 (Removal) was added. The "black letter" of the standard now states:

> Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused therefore should not occur over the objection of the attorney and the client.

The commentary to that rule stated "Clients, moreover, should have the right to continue satifactory relation-

ship with the defense attorneys in whom they have confidence and trust." This court need not address the issue of choice of counsel, but at a minimum the Court must recognize the obvious: that the attorney serves the client. Defenders do understand their obligation to the client as more than a professional chore as demonstrated by the first public defender, Goldfine. His unexplained removal, therefore, becomes more aggravated. The Court cannot presume necessity or justification from a silent record. Cf. Carnley v. Cochran, 369 U.S. 506 (1962). The trial court should have inquired into the circumstances surrounding the absence of the original attorney. If Mr. Goldfine had the appendicitis operation five weeks prior to the trial, he may have been available in the reasonable future

to handle the jury trial.

The continuity of representation is now well recognized both by the prosecution and defense in serious criminal cases. For these serious criminal cases "vertical" representation is preferred to "horizontal" representation.[24] In misdemeanor cases different counsel may appear at different stages of the proceeding because with a minor misdemeanor, especially reoccurring offenses, counsel after a quick review of the facts and brief discussion with the client is able to provide representation in these expedited proceedings. Felony

[24]Because of the need for follow-through as well as the possibility of early disposition, an attorney is assigned to a major case from the outset. This has been called "one-on-one" defense ("vertical" because the same lawyer follows the case through the whole process) as distinguished from "zone" defense (horizontal) where an attorney is assigned to a court rather than to a client. See ABA Standards of Criminal Justice: Providing Defense Services, Standard 5-5.2, and commentary at 5.54-5.55 (2d ed. 1979).

jury trials are relatively infrequent, for juries are requested in approximately one out of ten felony cases. The court of appeals fashioned a rule for a jury trial, and early representation in these cases should be encouraged from both the defendant's as well as the court's perspective.[25] The San Francisco public defender office, then as now, furnished counsel as early as the preliminary hearing conducted in Municipal Court. In California, the preliminary hearing is an important proceeding, for probable cause must be established by competent and lawful evidence.[26]

[25]Last-minute reassignment of counsel not only raises the issue of competency but may reflect counsel's inattention that may have compelled litigation where informed counsel may have achieved some better non-litigated disposition.

[26]Preliminary hearings are practically unknown in federal criminal practice, for the indictment eliminates the need. Even then, hearsay and illegally seized evidence are expressly authorized. Rule 5.1, Fed. R. Crim. P.

Moreover, the defendant may challenge by statutory motion, and if necessary by a pretrial writ proceeding, a subsequently filed information on the grounds of insufficiency of evidence at the preliminary hearing to hold him to answer for trial, or for denial of a substantial right which renders the magistrate's commitment illegal. People v. Pompa-Ortiz, 27 Cal. 3d 519, 165 Cal. Rptr. 851, 612 P.2d 941 (1980); Jones v. Superior Court, 4 Cal. 3d 660, 94 Cal. Rptr. 289, 483 P.2d 1241 (1971). Court scheduling conflicts, availability of witnesses, and other reasons justify a continuance. The court's perfunctory consideration and denial of the respondent's objection to the removal of counsel was inadequate. Calendar control is important to counsel as well as the court, but there must be mutual

interaction. The inquiry did not resolve the issue of absent counsel, and the Sixth Amendment required more. The entry of different attorneys at a late stage of a case taxes and stress the court system, alienates clients, and generates the odious appearance of a judicial "assembly line."[27]

F. Chambers v. Maroney Distinguished

Chambers v. Maroney, 399 U.S. 42 (1970), dealt with different counsel being appointed at a second trial when no issue was raised as to the result of the defendant's representation at the first trial. In the instant case, the focus is removal of counsel prior to two trials (Mr. Hotchkiss represented the respondent at both trials). The issue

[27]The National Legal and Defender Association has recommended a client receive only one attorney throughout the trial proceedings. NLADA National Study Committee Recommendation 5.11.

in Chambers was: "[T]he claim is that his appearance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial." 399 U.S. 42, 53. In the instant case, it is the removal of the first attorney who had prepared for trial. Respondent objected timely and vehemently, but the court failed to adequately inquire as to the reasons for replacing the originally designated defense counsel. This Court in Chambers stated, "Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases." 399 U.S. 42, 54. An early appointment was made in this case, but that relationship was destroyed without adequate explanation, resulting in the natural dissatisfaction of the client with the last-minute substitution.

G. Role of the Defender Attorney

Recently, this Court has had an opportunity to carefully assess and scrutinize the role of the public defender within the criminal justice system. In Branti v. Finkel, 445 U.S. 507 (1980), the Court singled out the unique role of the assistant public defender so as to preclude his removal from governmental office because of his political beliefs. The Court stated:

> The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversies with the State.

445 U.S. 507, 519. The Court then re-echoed a comment it made earlier in Ferri v. Ackerman, 444 U.S. 193 (1979):

> The primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective assistance repre-

> sentation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation.

Ferri v. Ackerman, 444 U.S. 193, 204, quoted in Branti v. Finkel, 445 U.S. 507, 519 (emphasis added).

In Ferri v. Ackerman, the appointed attorney in a federal criminal case was not immunized from a malpractice action, for the Court properly held an appointed lawyer to the same accountability as retained counsel. If the respondent had previously retained counsel, no court could have approved an involuntary and summary substitution of other counsel shortly prior to a jury trial. With retained counsel, the client has paid for expectations of promised perform-

ance. Should the indigent defendant be denied a similar expectation of promised personal service? Many multi-attorney law firms on occasion use a lawyer other than the one regularly assigned to the case, but such action is taken only with the consent of the client. Certainly a substitution at the most critical juncture in the representation--the jury trial by an unknown who was thought to be unprepared--would not be tolerated. The Sixth Amendment should not permit this in a case where a lengthy prison term was imposed solely because the impecunious defendant was forced to accept the state-furnished lawyer.

Some courts mistakenly subordinate the duty of defense counsel to the client to the convenience of the prosecutor or the court's calendar. The obligation to be prepared for trial is

the professional responsibility of all attorneys, appointed or retained, and the courts should demand readiness equally from both. Unfortunately, some courts feel that the public defenders can "fill in" when other cases "fold."[28] The decision of the court of appeals reflected a realistic appraisal of a serious and reoccurring problem in which courts under the pressure of heavy case loads would take "any lawyer" as defense counsel to get the case to trial. This Court, at the least, must clarify a misreading of Chambers that approves free substitution of counsel anytime before trial. Because the proof of a negative is so difficult, lack of proper preparation is difficult to detect with hindsight judi-

[28]Many defendants initially plead not guilty and the cases are set for jury trial, but most (85-90%) plead guilty before trial.

cial scrutiny limited to a cold record, even with a post-conviction proceeding, to an accurate assessment of the quality of the lawyer's performance. Recognition of the existence of the illness is the first step in finding a cure.

Calendar scheduling should be determined with the attorney who is going to try the case, and most courts prefer to fix a date certain convenient with the attorneys who will try the case to avoid last-minute continuances or changes. Only in rare cases (i.e. present hospitalization of counsel) would a continuance be required. Different attorneys on the same case are often unfamiliar with the details of the case and unnecessarily duplicate work for each new court appearance. The court depends upon informed counsel and for its own efficiency should insist on con-

tinuity. The appearance of substitute counsel is a first appearance of counsel, and with that appearance, if permitted by the court, a rule of thumb of a minimum thirty-day preparation period for a jury trial would provide a "bright line" for the due process element of the right to counsel.[29]

Last year, this Court in Polk County v. Dodson, 102 S. Ct. 445 (1981), held that public defenders and private lawyers were held to the same standards of competence and integrity. Although in the context of determining the applicability of a federal statute, the Court emphasized the traditional func-

[29]The Speedy Trial Act from the time of the first appearance of an attorney permits at least a thirty-day period of preparation before trial (18 U.S.C. § 3161(c)(2)), and this would seem as a reasonable minimum time period where a serious felony case is going to trial. Although no set "rule of thumb" is required, the time period in this case which generated such client complaints was too short.

tion of the criminal defense lawyer:

> Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. . . . In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client."

Polk County v. Dodson, 102 S. Ct. 445, 450 (emphasis added).

The defense lawyer's neglect of the client was compounded by the trial court's failure to inquire as to the propriety of the substitution. Judicial inaction after Ferri and Polk County, both filed after this state proceeding, reduces the high sounding principles of describing the defense advocate to meaningless mummery. Protection afforded the respondent will even more so insure

the professional independence of the many who now serve as defenders.

H. Duty to the Clients

Clients of public defenders have no unlimited right of choice of counsel, but some defender offices honor a client's request for other available counsel in the office or suggest to the court appointment of private counsel. When irreconcilable differences exist, the defender should withdraw. In Faretta v. California, 422 U.S. 806, 820-21 (1975), this Court closely examined the meaning of "Assistance of Counsel":

> The language and spirit of the Sixth Amendment contemplates that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant--not an organ of the state interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel

> is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. [Citations.] This allocation can only be justified, however by the defendant's consent, at the outset to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.[30]

Public defenders must disprove the "second-rate label." Encomiums from the courts affirming questionable practices and substandard performance, in effect,

[30]Justice Blackmun, dissenting because of the problems of pro per representation, noted: "Nor is this a case where distrust, animosity, or other personal differences between the accused and his would-be counsel have rendered effective representation unlikely or impossible." 422 U.S. 806, 848.

encourage even more egregious practices. In this case, the court of appeals in a narrow context addressed a misunderstood aspect of the right to counsel--that counsel and clients were not freely interchangeable. Even a judge should not interfere with a relationship satisfactory to the client but not to the court.[31]

Right to counsel for the indigent mandates protection from a convenient and unexplained removal of counsel, and appointed defense counsel, who recognize their role as subordinate to the client, as outlined above in Faretta, ask this Court to protect that duty to the client.

[31]The court of appeals relied upon Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65 (1968), where a criminal-law-wise superior court judge was reversed for removing an appointed lawyer who appeared not up to handling a capital case (649 F.2d 718, 721). That trial judge was the author of the court of appeals opinion.

The courts need to preserve that relationship that insures complete professional and independence of defense counsel which is essential for the effective administration of criminal justice.

II. PREJUDICE MAY BE INFERRED OR FOUND IN THIS CASE.

A. Inferred Prejudice

The court of appeals following Gideon v. Wainwright, 372 U.S. 335 (1963), and its progeny required reversal without an affirmative showing of prejudice.[32] This case falls closer to Gideon than to Chambers. The former deals with the right to counsel (qualitative) and the latter with the sufficiency of representation (quantitative). Prejudice might be required when sufficiency is challenged,

[32] 649 F.2d 718, 723.

but should not be required when the right to counsel is undermined. The respondent had a right to the "real lawyer" who did the preparation, investigation, and earned the good will of the client. The unjustified usurpation of the right to counsel is prejudice as a matter of law. Hindsight analysis is a poor substitute for clear enforceable standards that stress the need for pretrial preparation and continuity of counsel. The removal irreparably interfered with the right to counsel.

B. Actual Prejudice

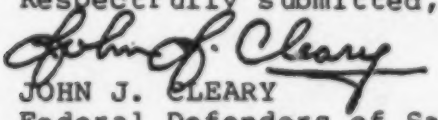
Substitute defense counsel possibly misspoke when he predicted a favorable outcome but cogently stated for the record that the defense "hinged" on the defendant's taking the stand. The failure is easily attributable to

fundamental antagonism between client and counsel. Our system posits the giving of every person his "day in court." The respondent was entitled to his "say in court," which was lost as a result of his substitution. Unlike United States v. Morrison, 449 U.S. 361 (1981), where the interference with the attorney-client relationship demonstrated no "demonstrable prejudice or substantial threat thereof," (449 U.S. 361, 365) the removal of previously assigned counsel and forcing the respondent, over strong objection, to jury trial in less than one week was, to paraphrase Morrison, "an identified constitutional infringement that has threatened some adverse effect upon the effectiveness of counsel's representation [and] has produced some other prejudice to the defense." 449 U.S. 361, 365.

CONCLUSION

The National Association of Criminal Defense Lawyers, the California Public Defenders Association, and the California Attorneys for Criminal Justice request that this Court recognize that public defenders are not fungible and affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JOHN PAUL MORRIS, *Petitioner*,

v.

JOSEPH D. SLAPPY, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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WHERE APPOINTED DEFENSE COUNSEL BECAME ILL BEFORE TRIAL, AND THE DEFENDANT OBJECTED TO NEW COUNSEL, THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO COUNSEL BY FAILING TO EXERCISE DISCRETION WHICH WOULD HAVE BALANCED DEFENDANT'S RIGHT TO CONTINUE A PREVIOUS FIRMLY ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP AGAINST THE STATE'S INTEREST IN A PROMPT TRIAL 2

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins respondent in seeking affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit. This case presents an issue regarding the

right of an indigent-accused to continued representation by a public defender with whom an attorney-client relationship has been firmly established. The case presents further issues as to the trial court's obligations in maintaining the sanctity of that established relationship. Finally, the petitioner has implicated the structural systems of public defender offices by suggesting that an affirmance of the decision of the Court of Appeals could result in abolition of the "horizontal" method, whereby new counsel is assigned at different stages of the trial court proceedings.

No other national organization represents public defenders as extensively as NLADA. No other national organization has the field experience in examination of the structure of indigent defense delivery systems which NLADA has.

NLADA also has an interest in protecting the rights of indigent clients and in insuring that they are not denied rights on the basis of their wealth. This brief is submitted on the clients' behalf as well.

NLADA has received the written consent of both parties for the filing of this brief.

ARGUMENT

WHERE APPOINTED DEFENSE COUNSEL BECAME ILL BEFORE TRIAL, AND THE DEFENDANT OBJECTED TO NEW COUNSEL, THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO COUNSEL BY FAILING TO EXERCISE DISCRETION WHICH WOULD HAVE BALANCED DEFENDANT'S RIGHT TO CONTINUE A PREVIOUS FIRMLY ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP AGAINST THE STATE'S INTEREST IN A PROMPT TRIAL.

The National Legal Aid and Defender Association will address two areas of concern to all appointed counsel.

First, NLADA will address the single most important issue in this case: whether Mr. Slappy was denied his Sixth Amendment right to counsel when the trial court failed to properly exercise discretion. When Mr. Slappy, the defendant, objected before trial to new counsel, the court failed to ascertain the facts behind the absence of Mr. Slappy's first appointed lawyer. Next, a response is offered to the erroneous suggestion by Petitioner that this Court must concern itself with the structure for assignment of a particular lawyer to a particular client of a public defender office; i.e., whether "horizontal" or "vertical" assignment of cases is appropriate.[1]

(A)

Once a particular attorney is assigned to the indigent defendant's trial, and an attorney-client relationship has been firmly established, the trial court must, when the defendant desires continued representation by that counsel, who has become temporarily ill, at least make some determination of the potential impact on the parties of forcing defendant to trial with new counsel.

The issue in this case is the trial court's failure to exercise discretion; it is not a question of an abuse of discretion or, precisely, of the defendant's right to demand particular appointed counsel. Petitioner distorts

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[1] Though used loosely in Petitioner's Brief (pp. 26-30), the terms "horizontal" and "vertical" representation were never precisely defined. Generally, vertical representation entails representation by a single lawyer throughout the trial process, while "horizontal" representation (also referred to as "zone," "stage," "sequential," or "tiered" representation) refers to assignment of a different attorney at one or more stages of the proceedings, such as initial appearance, pre-trial hearings, trial, and disposition.

the simple and straightforward holding of the Circuit Court of Appeals. The Circuit Court of Appeals states that Mr. Slappy complained the day his trial commenced that the assistant public defender newly assigned by the San Francisco Public Defender to try his case, Bruce Hotchkiss, was not prepared. Mr. Slappy had first met Hotchkiss six days earlier. The record shows that Mr. Slappy desired continued representation by Harvey Goldfine, whom he felt was familiar with his case and who had prepared to try it (J.A. 7-8, 14, 19-20, 24). Goldfine, another assistant public defender, had represented Mr. Slappy at his preliminary hearing and had investigated the facts of his case. Hotchkiss told the court on the day of trial, "Mr. Goldfine, who was to try this case, was operated on for appendicitis, that is how it was transferred." (J.A. 11-12). *Slappy* v. *Morris*, 649 F.2d 718, 719 (9th Cir. 1981).

The court made no inquiry as to the length of Mr. Goldfine's incapacitation,[2] not did it inquire as to the date of his expected return. The court treated Mr. Slappy's complaints as a motion for continuance, and ordered trial to proceed with Mr. Hotchkiss as defense counsel.

The trial court's failure to ascertain the extent of Goldfine's incapacitation requires reversal of the conviction for a new trial. This case does not, as Petitioner has characterized the issue, present this court with review of

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[2] When Mr. Slappy first saw Hotchkiss six days before trial, he had not seen Goldfine for five weeks (J.A. 19, 20, 24). This lapse in contact might as easily be attributable to Goldfine's illness as to any other reason. The defendant's suggestion that "I haven't seen him (Goldfine) because he's in the hospital" (J.A. 24) suggests this.

the exercise of discretion by the trial judge as to whether Mr. Slappy could demand continued representation by a particular deputy public defender. The trial court's failure to ascertain the pertinent facts left the Court of Appeals and this court with no record on which to make a judgment of the propriety of that demand. The Circuit Court of Appeals adopted no revolutionary rule of procedure—it merely required the trial court to fulfill its function as arbiter of fact and law before trial.

The trial court properly should have exercised its judgment under the circumstances; it simply failed to do so. The court's discretion was not totally unfettered. When the defendant objected to removal of Goldfine, the judge was not relieved of his burden of informed decision-making merely because of his power to initially appoint counsel, nor because of the appearance of Hotchkiss, who was assigned by the public defender, and who announced his readiness for trial.

Generally, it has been recognized that while an indigent's initial preference for a particular attorney may be considered by the court, the accused does not have an unqualified right to appointed counsel of his own choosing. *Reiff* v. *United States*, 299 F.2d 336 (9th Cir. 1962), *cert. denied*, 372 U.S. 937; *United States* v. *Hampton*, 457 F.2d 299 (7th Cir. 1972); *cert. denied* 409 U.S. 856. Once selected for the indigent defendant, substitution of counsel, requested by the attorney or the defendant also normally rests in the sound discretion of the court. *Thorton* v. *United States*, 357 A.2d 429 (D.C. App. 1976), *cert. denied*, 429 U.S. 1024.

Here, however, the situation was unclear, and all of the relevant facts were never ascertained by the court. First, the defendant clearly desired not substitution but retention or continuation of representation by Goldfine.

Second, Goldfine was not present in court, and could not be questioned. Third, Goldfine's illness was the sole reason for Hotchkiss' appearance at trial.[3]

Involuntary removal of counsel, over defendant's objections, presents a wholly different issue for the trial court than substitution at counsel's or defendant's request. The California courts have recognized this fact in cases which protect the indigent defendant's right to rely on an established, inviolable attorney-client relationship to prevent arbitrary removal. *Smith* v. *Superior Court of Los Angeles County*, 68 Cal. 2d 547, 68 Cal. Rptr. 1, 440 P.2d 65 (1968); *Cannon* v. *Commission on Judicial Qualifications*, 14 Cal. 3d 678, 122 Cal. Rptr. 778, 537 P.2d 898 (1975). Other jurisdictions also recognize that when an attorney-client relationship has been established, whether counsel is retained or appointed, the court may not arbitrarily interfere with or remove the attorney over objection of the defendant or counsel. *English* v. *State*, 8 Md. App. 330, 259 A.2d 822 (1969); *McKinnon* v. *State*, 526 P.2d 18 (Alaska 1974); *Harling* v. *United States*, 387 A.2d 1101 (D.C. App. 1978).

This line of cases merely gives voice to what is implied in the well-established principles of this court's decisions recognizing both the need for mutual independence of the

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[3] Stated another way, the judge was faced with a question which only he could answer: who was Mr. Slappy's lawyer? In the face of Slappy's objection to removal of Goldfine, only the court could decide the issue. It *may* have found that the five-week hiatus since Mr. Slappy last saw Goldfine was due to Goldfine's illness, and that Goldfine would recover imminently. It *may* have found that Goldfine suffered complications, and might not return for weeks. Unfortunately, it found no facts regarding the illness, and therein lies the error.

bar and the judiciary, *In re McConnell*, 370 U.S. 230, 236, 82 S.Ct. 1288, 1292, 8 L.Ed. 2d 434, 438-439 (1962), and the equal treatment of retained and appointed counsel, at least when he or she is "performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County* v. *Dodson*, ____ U.S. ____, 102 S.Ct. 445, 453, 70 L.Ed. 509, 521 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980); *Ferri* v. *Ackerman*, 444 U.S. 1983, 100 S.Ct. 402, 62 L.Ed. 355 (1979); *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). In fact, to hold otherwise would be to erode the very underpinnings of the decisions of this court which protect the special quality of the attorney-client relationship from unwarranted and invidious discrimination based on the poverty of the accused. *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).

Here, the trial court not only failed to accord any weight to the established attorney-client relationship, but totally failed to ascertain the extent of the delay, the extent of new counsel's preparedness or knowledge of facts in the case, or of the potential damage to the prosecution's case which might be occasioned by delay. It was this failure to properly act, rather than an abuse of the court's discretion, which requires reversal of the decision. Failure to act presents this court with a record devoid of facts upon which to review the decision. Failure to exercise discretion, or refusal of judicial action in this context has, in the past, been distinguished by this court from abuse of discretion, and results in a heavy burden on the state to justify violation of the accused's fundamental Sixth Amendment right to counsel. *Powell* v. *Alabama*, 287 U.S. 45, 52, 53 S.Ct. 55, 60, 77 L.Ed. 158, 162 (1938) (trial court has duty, whether requested or not, to assign counsel in capital case); *Johnson* v. *Zerbst*, 304 U.S. 458,

469, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461, 1469 (1937) (District Court, on *habeas*, failed to make findings as to waiver of counsel, requiring remand); *Herring* v. *New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed. 2d 593 (1975) (trial court's refusal to allow summation by defense counsel in bench trial, even based on statute, is denial of counsel).

It is no answer to suggest that the court was acquitted of its responsibilities by the appearance of new counsel assigned internally by the San Francisco Public Defender Office.[4] Were there a demonstration on the record that the defendant and his prior counsel acceded to the substitution, a different question might be presented. Here, however, the defendant strongly objected to the replacement throughout both his first and second trials on the charges, and Goldfine's wishes were never ascertained on the record. On the day of trial, the court was faced with an angry defendant and little factual information. Such circumstances call for the exercise of sound judicial judgment.

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[4] California, like many other states, gives the trial court wide latitude in the initial appointment of counsel. *Cal. Penal Code*, Sec. 987(a) provides only that the court appoint "counsel" in cases such as Mr. Slappy's. Case law provides that the court "normally" appoint the public defender, in the absence of a conflict of interest. *Spruance* v. *California Commission on Judicial Qualifications*, 13 Cal. 3d 778, 779; 119 Cal. Rptr. 841, 532 P.2d 1209 (1975). The court was not obliged to do so, but did appoint "the public defender" at an earlier stage in the proceedings (RT82). Once appointed, the public defender was obligated to accept the case, in the absence of a conflict of interest. *Cal. Gov. Code*, Sec. 27706(a). These statutes and case law are typical.

The action of the public defender office in substituting counsel was, to be exact, irrelevant to the judge's obligation to determine if such a substitution was in the best interest of all the parties, particularly the objecting defendant.

In practical effect, the trial court's failure to exercise discretion in an informed manner resulted not merely in delay, but denial of Mr. Slappy's right to counsel. Under such circumstances, the mandate of this court is clear—reversal is required. *Powell* v. *Alabama*, *supra; Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Gideon* v. *Wainwright*, *supra*, *Herring* v. *New York*, *supra; Geders* v. *United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976); *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978).

This court must affirm the judgment of the Court of Appeals and remand for a new trial.

(B)

The decision of the Circuit Court of Appeals holds no implications, factually or legally, for the adoption by public defender offices of "horizontal" or "vertical" systems for case assignment.

The petitioner's brief asserts, at length, the factually and legally erroneous proposition that affirmance of the Circuit Court of Appeals would "undermine" the operation of public defender offices by a rule which "greatly restricts, if not eliminates" the use of horizontal, or tiered, case assignments by public defender offices. (*Brief for Petitioner* pp. 25-30). In this context, "horizontal" representation refers to the assignment of more than one lawyer at various stages of the trial proceedings, while "vertical" representation refers to assignment of a single lawyer throughout the trial court level.

The issue in this case is not whether different appointed attorneys can represent a defendant at different stages of the proceedings. That issue is not before this court, legally or factually. The issue is solely whether the trial court may remove an appointed attorney without exercising appropriate discretion to determine whether the delay necessitated by continued representation would be inappropriate.

In a footnote, the petitioner asserts that the San Francisco Public Defender's Office "has developed a hybrid system of horizontal representation in the majority of cases, with continuous representation by a single deputy in some cases." *Id.*, n.17, at 26; citing Abt Associates, Inc., *The San Francisco Public Defender Office: A Preliminary Assessment*, Aug. 5, 1980.[5]

The opinion of the Court of Appeals makes no mention of the terms "horizontal," "tiered," or "vertical." The entire focus of the opinion lies not in the actions of the defender office, but in the inaction of the court. Moreover, the record clearly shows that the assignment of the case to Hotchkiss was not due to horizontal structure of services, but only to Goldfine's illness. Hotchkiss first advised Mr. Slappy that he would represent him at trial on the Friday preceding trial. On the first day of trial on the following Thursday, Hotchkiss announced that "Mr.

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[5] More accurately, the report states that "misdemeanors are handled vertically, while felonies are handled horizontally. Under the new system, vertical representation will be permitted on a selected basis in two preliminary hearing courts." *Id.* at 8. Because annual misdemeanor caseloads are more than double the felony caseload of the office (*Id.*, footnote at 15) the majority of cases are handled vertically.

Goldfine, *who was to try this case*, was operated on for appendicitis, *that is how it was transferred.*" *Slappy* v. *Morris*, *supra*, 649 F.2d at 719 (emphasis added). Whether or not the San Francisco Public Defender used horizontal representation in this case, a fact not in the record, Hotchkiss' statement shows that 1) Goldfine originally had been assigned to try the case; and 2) transfer only occurred due to Goldfine's illness. These facts firmly rebut the relevance of any discussion regarding the merits of horizontal versus vertical representation.

The structure of the public defender office in internal assignment of cases to particular assistants is not at issue here.[6] In fact, as demonstrated in Argument A above, it is irrelevant, once the defendant objected openly to the court. Once the objection was raised, the burden shifted to the court to support its decision to deny continuous representation on some fact other than the bald assertion by new counsel that he was ready for trial.

Petitioner asserts that, if upheld, the decision of the court of appeals would restrict or eliminate the more cost-efficient horizontal system of case assignments, "and

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[6] One wonders at the responses which might be offered if a public defender were to impugn the organizational chart of a prosecutorial office. If the assignment system of a public defender is subject to scrutiny because of its "constitutional implications" one can speculate whether the creative prosecutor might next challenge the internal operations of large private law firms providing representation in criminal cases, whether retained or appointed. One study, in fact, found that sequential transfer of cases between private attorneys occurred in 10% of the felony cases examined in Cook County, Illinois. Gilboy and Schmidt, "Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants," 70 *Journ. of Crim. L. and Crimin.* 1, 6 (1979).

will inexorably result in increased expenditure of limited state and local funds in order to continue effective representation for indigent clients." *Brief of Petitioner*, at 28. This court, however, has frequently recognized that denial of fundamental constitutional rights cannot depend on the asserted lack of public funds with which to address the problem. *Charlotte-Mecklenberg Board of Education* v. *Swann*, 402 U.S. 1, 91 S.Ct. 191, 28 L.Ed. 2d 554 (1970) (desegregation); *Hutto* v. *Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978) (prisons); *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972) (right to counsel in certain misdemeanor cases).

Budgetary implications, moreover, should not and do not always drive the decision of a public defender office to adopt a particular system for assignment of cases. Horizontal and vertical systems exist in various forms, and are seldom found in pure theoretical design. Use of one system or the other may depend on whether the case is a traffic charge, a "heavy" misdemeanor, a felony, a "serious" felony, or a homicide.[7] The system may be partially horizontal and partially vertical, as in San Francisco, where preliminary hearing representation is vertical

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[7] See, *e.g.*, Cook County (Chicago) Public Defender "task forces" for homicide and sex offense cases, where normally horizontal representation was made continuous, cited in National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States*, 465 (Final Report, 1976). In Philadelphia, representation is reported as horizontal, except in certain "major crimes" with specified criteria, where representation is continuous. *Ibid.*; see also Comment, "Client Services in a Defender Organization: The Philadelphia Experience," 117 *U. Pa. L. Rev.* 448, 469 (1969); Comment, "The Philadelphia Defender Program," 26 *NLADA Briefcase*, 118 119-120 (1968).

while representation after that point is horizontal.[8] Even factors outside the control of the defender office may dictate case assignment. These factors might include charging practices, the availability of attractive plea bargains, the assignment preferences of local judges, or even the physical location of courtrooms, jails and other facilities.[9]

In short, the creation of a particular assignment system, particularly in larger offices where trial attorney staffs may exceed 200, will be a function of myriad factors, and will frequently be mixed and matched to fit local practice. The test for whether these systems are valid, as several courts have noted, is whether the defendant receives the effective assistance of counsel in his defense. *E.g.*, *Moore* v. *United States*, 432 F.2d 730, 736 (3d Cir. 1970). No system of assignment, whether horizontal or vertical, has been held to be *per se* violative of the Sixth Amendment. See *People* v. *Martinez*, 145 Cal. App. 2d 361, 302 P.2d 643 (1956); *Moore* v. *United States*, *supra*.

Finally, contrary to the assertions of the petitioner, if the merits of the horizontal and vertical systems were at issue here and were tested against constitutional standards, the outcome of the Court of Appeals would still be sustained, though on wholly different grounds. Virtually without exception, scholars and courts examining the two systems have found horizontal delivery to be lacking; in fact, such representation has been found wanting on

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[8] Abt Associates report, *supra*, n. 5.

[9] See *e.g.*, Eisenstein and Jacobs, *Felony Justice: An Organizational Analysis of Criminal Courts*, 72-77 (1977) (describing structure in Philadelphia, Los Angeles and Baltimore); Katz, "Gideon's Trumpet: Mournful and Muffled," 55 *Iowa L. Rev.* 523, 543, 549 (1970) (describing Cincinnati structure).

ethical as well as legal grounds.[10] Interestingly, the reasons for which horizontal representation is attacked closely parallel the reasons for caution in severance of an established attorney-client relationship: 1) work is frag-

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[10] *Ethical Considerations: The ABA Code of Professional Responsibility*, DR 2-110(C) (1976) provides that ". . . a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters," except in limited circumstances. EC 2-32, which accompanies the rule, further provides:

> A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even where he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

The proposed *Model Rules of Professional Conduct*, Rule 1.6(c) and (d) (May 30, 1981 Proposed Final Draft) adopts much of the language of EC 2-32. See also Portman, "Public Defender Office Administration," 29 *NLADA Briefcase* 107, 111-112 (1971).

National Standards: The ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-5.2 (1980) provides, in part:

> Counsel initially provided should continue to represent the defendant throughout the trial court proceedings.

The National Study Commission on Defense Services, *supra*, n.7, Section 5.2 provides, in part:

> Whenever an attorney-client relationship has been established between an eligible accused and his attorney, the defense system should not terminate or interfere with that relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship.

Scholarship: Typical of the treatises and articles critical of horizontal representation, in addition to those already cited, are: Krantz, Smith, Rossman, Froyd, *The Right to Counsel in Criminal Cases: The Mandate of Argersinger* v. *Hamlin* 220 (1976); Casper, *American Criminal Justice: The Defendant's Perspective* 103 (1972) Note,

mented among lawyers whose work is uncoordinated; 2) communication from lawyer to lawyer is truncated, at best, and frequently nonexistent; 3) counsel and client must duplicate work with re-interviews and reconstruction of the history of the case;[11] 4) objective information such as off-the-record conversations and untranscribed proceedings cannot be effectively communicated; 5) subjective information, such as witnesses' demeanor, prosecutorial attitudes, visual impressions and other intuitive feelings are lost in transference from one attorney to another; 6) lack of coordination may result in a failure to pursue preparation of a portion of the case; 7) gaps may occur between withdrawal and appointment, leaving the defendant without counsel at critical stages; 8) late re-assignments may result in last-minute preparation for trial; 9) no unified strategy of the defense is developed; and 10) defendants feel like a "case" rather than a person,

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"Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems," 13 *Stan. L. Rev.* 522, 543, n.137 and accompanying text (1961); Wice and Suwak, "Current Realities of Public Defender Programs: A National Survey and Analysis," 10 *Crim. L. Bul.* 161, 165 (1974).

Caselaw: Several cases have strongly criticized horizontal assignment schemes: *United States ex rel. Thomas* v. *Zelker*, 332 F. Supp. 595, 599 (S.D.N.Y. 1979); *Wallace* v. *Kern*, 392 F. Supp. 834, 843 (E.D.N.Y. 1973) *rev'd on other grounds* 499 F.2d 1345 (2d Cir. 1974); *Jones* v. *United States*, 342 F.2d 863, 870-71 (D.C. Cir. 1964).

[11] This factor alone may more than offset the time purportedly saved by staged assignment. See chart depicting unpublished study of elapsed time in dispositions for homicide cases in Cook County, Illinois, showing reduction in processing time with continuous representation by "task force." National Study Commission on Defense Services, *supra*, n. 7, at 467-468.

and are likely to become uncooperative or lose confidence in counsel's abilities.[12]

These factors, collectively, strongly suggest that horizontal representation is subject to strong criticism which goes to the very heart of the adversary process. Therefore, when a defendant complains of removal of his assigned lawyer, the trial court is well advised to consider carefully the ramifications of such action.

None of this argument is to suggest, of course, that the trial court could not sustain substitution of new counsel after careful consideration of all factors, particularly if the defendant so desires. The instant case presents the predicate to the issue of review of the considerations of the trial court; the burden on the trial court to *know* the facts before it decides. Because the trial court failed to adequately balance the defendant's right to maintain an established attorney-client relationship against the state's interest in speedy disposition, this court must reverse and remand for a new trial.

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[12] These factors are comprehensively examined in both the commentary to Standard V, 5.12(c) of the National Study Commission on Defense Services, *supra*, n. 7, at 462-470, 477, 520 and in an excellent article, Gilboy and Schmidt, "Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants," 70 *Jour. of Crim. L. and Crimin.* 1 (1979).

Amicus Brief

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No. 81-1095

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN PAUL MORRIS, WARDEN, PETITIONER

v.

JOSEPH D. SLAPPY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the trial court's denial of a continuance on the first day of trial deprived respondent of his right to the effective assistance of counsel.

2. Whether, at the time the trial court considered the matter of a continuance, respondent asserted a right to be represented at trial by the first deputy public defender assigned to his case.

3. Whether, assuming respondent did sufficiently assert such a right and assuming further that the Constitution furnishes an indigent defendant protection against arbitrary substitution of appointed counsel, it was arbitrary for the public defender to assign another attorney in his office to respondent's case when the first attorney had surgery for appendicitis one week before trial and arbitrary for the court to deny a continuance until the first attorney recovered.

4. Whether, if there was an impermissible interference with respondent's interest in being represented at trial by the first attorney assigned to the case, his conviction should be set aside without a showing of prejudice.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1095

JOHN PAUL MORRIS, WARDEN, PETITIONER

v.

JOSEPH D. SLAPPY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents important questions concerning the right to the assistance of counsel in criminal cases, including the extent to which the defendant has a constitutional right to be represented by counsel of his choice, the scope of a trial court's discretion in granting or denying a continuance to allow counsel more time to prepare or to allow the defendant to be represented by other counsel, and whether prejudice must be shown to obtain relief where the trial court has erroneously deprived a defendant of counsel of his choice. These issues arise with some frequency in federal criminal cases. In some situations, as here, the question concerns the denial of a continuance to permit counsel more time to prepare or to enable the defendant to be represented by other counsel. More common, however, are cases in which the defendant asserts that he has a Sixth Amendment right to be represented by a particular attorney of his choice, notwithstanding a conflict of interest.

STATEMENT

1.a. In 1976, respondent was charged in Superior Court for the City and County of San Francisco with rape, robbery, burglary, oral copulation, and false imprisonment. At arraignment, the local Public Defender's Office was appointed to represent him. Deputy Public Defender Harvey Goldfine of that Office appeared on behalf of respondent at his preliminary hearing and conducted the investigation of the case. Prior to trial, however, Goldfine underwent surgery for appendicitis. The Public Defender therefore reassigned the case to another of his deputies, Bruce Hotchkiss, six days prior to the scheduled trial date (Pet. App. A-2 to A-3, D-1; J.A. 7-8, 11-12).

During preliminary proceedings on the first day of trial, a Thursday, respondent complained to the court that Hotchkiss had not had sufficient time to prepare the case (J.A. 7). Respondent stated that Hotchkiss had not interviewed him until Tuesday, which, respondent asserted, permitted Hotchkiss only a day and a half to investigate and prepare for trial (J.A. 8). The trial court understood respondent's complaint to constitute a request for a continuance and denied the request (J.A. 7-9). The court explained that the Public Defender's Office had "very adequately represented" respondent to that point and that, on the basis of assurances given by Hotchkiss and the District Attorney, it was satisfied that an "able and adequate defense" could be made for respondent (J.A. 9). Hotchkiss represented to the court that after reviewing the file he received from Goldfine and in light of the investigation that previously had been done, he was prepared for trial and a continuance was unnecessary (J.A. 11). Respondent stated that he was "satisfied with the Public Defender," but reiterated his view that Hotchkiss had not had sufficient time to prepare (J.A. 12).

b. On the second day of trial, respondent again complained that Hotchkiss was unprepared because he had had only a day and a half to prepare for trial (J.A. 16-17). The judge replied that he had known Hotchkiss for almost ten years and had "every confidence" in him; that Hotchkiss had been assigned to

the case a week earlier; and that Hotchkiss had told him that the case was well prepared by Harvey Goldfine, whom the judge also regarded as "very capable" (J.A. 17-18). Against this background, the judge concluded: "When Mr. Hotchkiss makes a representation that he has prepared the case, reviewed all the matters, obtained the pictures, and other items that he intends to produce into evidence, I have no reason to dispute, [to] doubt that" (J.A. 18). The court added that it was "satisfied in the way the case is progressing that Mr. Hotchkiss is doing a more than adequate job, a very fine job" (J.A. 18-19). The court also advised respondent that there would be a three-day weekend recess in the trial, during which he could consult with Hotchkiss about any other matters to be explored (J.A. 19, 25-26).

Hotchkiss informed the court that he had discussed the case with respondent for three hours on the Tuesday before trial and on two more occasions on Wednesday. He further explained that Goldfine did "voluminous investigation in the case" and that it was his feeling "that all investigation that needed to be done and that should be done and quite possibly that could be done has been done" (J.A. 21-22). Hotchkiss stated that when he announced he was ready for trial, he believed it was necessary for him only to review the material that was then in the file and to prepare himself for cross-examination of government witnesses; he anticipated that he would have the weekend free to discuss with respondent his direct and cross-examination (J.A. 23). Hotchkiss also represented to the court that, contrary to respondent's assertion, he had been to the scene of the crimes and discussed the scene with respondent (J.A. 27).

c. After the three-day weekend recess, respondent filed a petition for a writ of habeas corpus, contending that his attorney, Goldfine, was in the hospital, that legally he did not have an attorney, and that Hotchkiss had told him he did not have a defense to the charges (J.A. 29). Hotchkiss replied that he had not told respondent that he had no defense (J.A. 29, 34, 41) and that he had always proceeded along the lines of the defense respondent had outlined (J.A. 34). The court denied respondent's request for habeas corpus relief (J.A. 31).

Hotchkiss informed the court that respondent had refused to see him on Saturday or Monday and that, as a result, Hotchkiss was not prepared to put respondent on the stand—a measure Hotchkiss thought was important for respondent's theory of the case (J.A. 33). Respondent requested to be excused from the trial, stating that he was "through" with the proceedings (J.A. 31, 34, 35-38). The court denied this request (J.A. 38) and respondent remained, although he declined to testify on his own behalf, despite Hotchkiss' urging (J.A. 39-40). Respondent was convicted on the robbery, burglary, and false imprisonment counts, but the jury could not agree to a verdict on the rape and oral copulation charges (Pet. App. A-5). Respondent was convicted on the rape and oral copulation counts at a second trial a week later, at which he again was represented by Hotchkiss. (Pet. App. A-6).

2.a. After the California Court of Appeal affirmed respondent's convictions (Pet. App. C), he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The district court denied relief. The court found that "[t]he record supports the trial judge's conclusion that Hotchkiss had adequate time to prepare for the trials and that he presented an able defense despite [respondent's] lack of cooperation with him" (Pet. App. D-3 to D-4). The district court also held that "it was not unreasonable to conclude that the efficient administration of justice required that [respondent] be represented by Hotchkiss rather than by Goldfine after the latter had fully recovered from his surgery" (*id.* at D-4 to D-5).

b. The court of appeals reversed. It acknowledged (Pet. App. A-7) that an indigent defendant does not have an unqualified right to the appointment of counsel of his choice. But the court reasoned that once Goldfine had been assigned to represent respondent and entered into an attorney-client relationship with him, the Sixth Amendment "encompasse[d] the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance founded on the temporary unavailability of [respondent's] particular attorney" (*id.* at A-17). The court therefore held that the denial of a

continuance violated respondent's Sixth Amendment rights because the trial court did not first inquire about the probable duration of Goldfine's illness so that it could weigh respondent's interest in having counsel of his choice against the societal interest in the prompt and efficient administration of justice (*id.* at A-17 to A-18).

The court of appeals also held that prejudice need not be shown in order for respondent's convictions to be set aside. The court acknowledged (Pet. App. A-21) that, under this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970), a defendant's claim that the late appearance of substitute counsel rendered that counsel's performance ineffective does not warrant relief absent a showing of prejudice. However, the court found the instant case more analogous to decisions of this Court in which a showing of prejudice was not required where counsel either was not furnished at all or was prevented from fulfilling his normal functions (Pet. App. A-22 to A-23). The court reasoned that the denial of a continuance in this case likewise prevented defense counsel from fulfilling a normal function: forming and exploiting an attorney-client relationship with the defendant (*id.* at A-21 to A-22 n.4, A-23 to A-24).

SUMMARY OF ARGUMENT

A. The court of appeals held that respondent's Sixth Amendment right to the assistance of counsel was violated and granted habeas corpus relief because the state trial court denied respondent's request for a continuance at the beginning of the trial. However, respondent in fact had the assistance of counsel at trial—experienced counsel from the same Public Defender's Office as his original attorney, who had six days to prepare for trial and who represented to the trial court that the case was fully investigated, that he was ready to proceed, and that a further continuance would not assist him in defending respondent. Because respondent has not shown that the timing of Hotchkiss' assignment to the case prejudiced the defense, this Court's decisions in *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970); *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591 (1964);

and *Avery* v. *Alabama*, 308 U.S. 444 (1940), compel rejection of an ineffective assistance of counsel claim.

B.1. The court of appeals erred in seeking to avoid the controlling force of this Court's decisions by shifting the focus of the Sixth Amendment inquiry from the adequacy of the representation actually afforded by Hotchkiss to the termination of respondent's prior attorney-client relationship with Goldfine. When the matter of a continuance arose, respondent did not request that the court inquire into how long Goldfine would be unavailable; did not seek a continuance until Goldfine was available; and, indeed, did not even inform the court that he wanted to be represented by Goldfine rather than Hotchkiss. Respondent simply asserted that *Hotchkiss* needed more time to prepare. Because respondent did not assert a right to be represented by Goldfine, the trial court's denial of a continuance did not deprive respondent of any such right.

2. In any event, the Sixth Amendment guarantees a defendant the right "to have the assistance of counsel for his defense." Respondent in fact *had* the assistance of experienced counsel for his defense, and there has been no showing that Hotchkiss' assistance was ineffective. The terms and purposes of the Sixth Amendment therefore were fully satisfied in this case.

The court of appeals, however, found a constitutional violation by attaching controlling significance to the identity of defense counsel, rather than his performance. This Court, it is true, has indicated that due process principles afford some protection against arbitrary interference with an individual's choice of retained counsel to represent him. *Powell* v. *Alabama*, 287 U.S. 45, 53, 69 (1932). But this protection against arbitrary interference does not immunize a party's choice of counsel from the effect of reasonable laws, regulations, or judicial orders that are rationally related to the accomplishment of legitimate governmental purposes. Thus, a defendant's selection of a particular attorney is limited by requirements for the admission of attorneys to practice before the court, ethical rules restricting an attorney's acceptance of certain cases, and measures designed to ensure the efficient administration of justice.

It is not clear that similar constitutional principles are implicated where, as here, counsel is appointed for an indigent defendant, for it is well-settled that such a defendant has no constitutional right to be represented by a particular attorney. However, assuming arguendo that the Constitution protects an indigent defendant's relationship with appointed counsel from arbitrary termination, the substitution of Hotchkiss for Goldfine in this case plainly was not arbitrary. The court appointed the Public Defender's Office, not Goldfine personally, to represent respondent, leaving to the Public Defender the responsibility for assigning a member of his staff to the case. Serious illness is unquestionably a legitimate ground for an attorney to withdraw from a case, and such an illness therefore was a legitimate reason for the Public Defender to reassign the case to another of his deputies. There was, moreover, an orderly transition from one attorney to the other, and Hotchkiss had an adequate opportunity to prepare the defense and to confer with respondent both prior to and during trial.

3. Finally, even if the court of appeals were correct that respondent's interest in being represented by Goldfine was not given sufficient deference by the trial court, it erred in setting aside his convictions without a showing of prejudice to the fairness of the trial or the effectiveness of the assistance of counsel respondent received. *United States* v. *Morrison*, 449 U.S. 361 (1981).

ARGUMENT

THE DENIAL OF A CONTINUANCE DID NOT VIOLATE RESPONDENT'S CONSTITUTIONAL RIGHTS AND DID NOT IN ANY EVENT ENTITLE HIM TO A NEW TRIAL

A. The Denial Of A Continuance Did Not Violate Respondent's Right to the Effective Assistance of Counsel

The court of appeals held that respondent's constitutional rights were violated when the trial court declined to order a continuance on the first day of trial. This court has stressed, however, that "[t]he matter of continuance is traditionally

within the discretion of the trial judge," *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964), and the judge's decision will be reviewed only for an abuse of that discretion. See, *e.g.*, *United States* v. *Gonzalez-Palma*, 645 F.2d 844, 846-847 (10th Cir.), cert. denied, No. 81-75 (Oct. 5, 1981); *United States* v. *Phillips*, 640 F.2d 87, 92-93 (7th Cir.), cert. denied, 451 U.S. 991 (1981).

Moreover, where, as here, the denial of a continuance is raised on collateral attack, it must be shown that the denial was "so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Hicks* v. *Wainwright*, 633 F.2d 1146, 1148 (5th Cir. 1981). See *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 589; *United States* v. *Frady*, No. 80-1595 (April 5, 1982), slip op. 16, 18; *Engle* v. *Isaac*, No. 80-1430 (April 5, 1982), slip op. 10. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 589. The circumstances present in this case clearly demonstrate that the denial of a continuance was not "so arbitrary as to violate due process."

Here, for example, the denial of a continuance did not compel respondent to defend without counsel, as in *Ungar* v. *Sarafite*, where the refusal to grant a continuance nevertheless was sustained. See also *United States* v. *Leavitt*, 608 F.2d 1290, 1293 (9th Cir. 1979); compare *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954); *House* v. *Mayo*, 324 U.S. 42, 46 (1945). Respondent *had* the assistance of experienced counsel in Hotchkiss. Nor has respondent shown or any court found that the denial of a continuance resulted in the failure to offer evidence on his behalf, as in *Ungar* v. *Sarafite*, or otherwise prejudiced Hotchkiss' defense of respondent.

Respondent's complaint on the first day of trial, which the trial court construed to be a request for a continuance, was that Hotchkiss could not have been adequately prepared for trial in view of the lateness of his assignment to the case. But Hotchkiss was not assigned to the case "at such a time or under such circumstances as to *preclude* the giving of effective aid in the

preparation and trial of the case." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (emphasis added). There was here no "denial of *opportunity* for appointed counsel to confer, to consult with the accused and to prepare his defense," such that the appointment of counsel was merely a "sham" and nothing more than "formal compliance" with the Sixth Amendment. *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940) (emphasis added); compare *Hawk* v. *Olson*, 326 U.S. 271, 276-278 (1945); *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Brescia* v. *New Jersey*, 417 U.S. 921 (1974) (Marshall, J., dissenting from denial of certiorari). On the contrary, the record affirmatively shows that Hotchkiss had ample time to prepare, based on the extensive investigation already undertaken by the Public Defender's Office, and that he had an opportunity to consult with respondent on a number of occasions both prior to and during trial.[1]

Indeed, as the court of appeals recognized (Pet. App. A-21 to A-22 n.4), this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970), compels the rejection of any Sixth Amendment claim based on Hotchkiss' asserted lack of preparation. In *Chambers*, as here, a defender organization (the Legal Aid Society) was appointed to represent the defendant. A Legal Aid attorney represented the defendant at his first trial, which ended in a mistrial. No one from Legal Aid again conferred with the defendant until a few minutes before his second trial, when a new Legal Aid attorney appeared to represent him. In *Chambers*, as in the trial court in this case, the claim was not that the new attorney was incompetent or inexperienced, but rather that his appearance for the defendant was so belated that it must be conclusively presumed that he could not furnish effective assistance. The Court rejected

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[1] It is true that respondent refused to meet and confer with Hotchkiss when he had an opportunity to do so over the weekend recess in the trial, but the defendant's own refusal to take advantage of an opportunity to consult with counsel does not establish a Sixth Amendment violation. Compare *Geders* v. *United States*, 425 U.S. 80 (1976); cf. *Brescia* v. *New Jersey*, *supra*, 417 U.S. at 925 (Marshall, J., dissenting from denial of certiorari). See note 4, *infra*.

the claim of ineffective assistance of counsel because there was no showing of prejudice resulting from the late appearance of counsel. The Court observed that although "courts should make every effort to effect early appointments of counsel in all cases," it was "not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel." 399 U.S. at 54; see also *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972).

In the instant case, respondent explicitly objected prior to trial that counsel was unprepared, and the court accordingly conducted an inquiry into the objection. Cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 345-347 (1980). The court was satisfied that counsel was prepared, based in large measure on counsel's own representations and his statement that a continuance was unnecessary. See *United States* v. *Vader*, 630 F.2d 792, 793-794 (10th Cir.), cert. denied, 449 U.S. 1037 (1980); cf. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 347; *Holloway* v. *Arkansas*, 435 U.S. 475, 485-486 (1978). Respondent has offered nothing to show that Hotchkiss' representation or the trial court's conclusion was erroneous or that he was prejudiced by the timing of Hotchkiss' assignment to the case. It therefore follows *a fortiori* from *Chambers* v. *Maroney* that respondent has not established a Sixth Amendment violation based on ineffective assistance of counsel. See also *Avery* v. *Alabama*, *supra*, 308 U.S. at 450-453; *United States* v. *Veatch*, 647 F.2d 995, 1004-1005 (9th Cir. 1981); *United States* v. *Gonzalez-Palma*, *supra*, 645 F.2d at 847; *United States* v. *Phillips*, *supra*, 640 F.2d at 92-93; *United States* v. *Badwan*, 624 F.2d 1228, 1231 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981); *United States* v. *Berkwitt*, 619 F.2d 649, 658-659 (7th Cir. 1980); cf. *Smith* v. *Phillips*, No. 80-1082 (Jan. 25, 1982), slip op. 9-11.[2]

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[2] The Tenth Circuit disregarded these principles in several recent decisions involving what the court believed to be inadequate preparation time resulting from counsel's late appointment or the denial of a continuance. See *United States* v. *Cronic*, No. 80-1955 (April 19,

B. The Denial Of A Continuance Did Not Impermissibly Interfere With Respondent's Interest In Being Represented By Counsel Of His Choice And Did Not In Any Event Entitle Him To A New Trial

The court of appeals attempted to avoid the controlling force of this Court's decision in *Chambers* v. *Maroney* by shifting the focus of the Sixth Amendment inquiry from the adequacy of

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1982), slip op. 4; *United States* v. *King*, 664 F.2d 1171, 1172-1173 (1981); *United States* v. *Golub*, 638 F.2d 185, 187 (1980). In these cases, the Tenth Circuit dispensed with the requirement of a showing of prejudice under circumstances that did not approach those present in *Powell* v. *Alabama* and similar cases, where counsel's appearance was so late that his assistance was conclusively presumed to have been ineffective. The government has filed petitions for rehearing en banc in *United States* v. *Golub* and *United States* v. *Cronic*, and those petitions are still pending at this writing.

In other situations, however, the courts of appeals generally have required some showing of prejudice in order for a conviction to be set aside on the ground of ineffective assistance of counsel. See, *e.g.*, *United States* v. *Green*, No. 80-2461 (D.C. Cir. May 21, 1982), slip op. 12-17; *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979); *id.* at 232 (MacKinnon, J., concurring); *United States* v. *Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States ex rel. Johnson* v. *Johnson*, 531 F.2d 169, 177 (3d Cir.), cert. denied, 425 U.S. 997 (1976); *Marzullo* v. *Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *United States* v. *Murzyn*, 631 F.2d 525, 534 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981); *Long* v. *Brewer*, 667 F.2d 742 (8th Cir. 1982); *United States* v. *Donn*, 661 F.2d 820, 824 (9th Cir. 1981); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980); see also *United States* v. *Renfro*, 600 F.2d 55, 58 (6th Cir.), cert. denied, 444 U.S. 941 (1979). But see *Wiley* v. *Sowders*, 647 F.2d 642, 650 (6th Cir.), cert. denied, No. 81-113 (Nov. 30, 1981) (question whether prejudice must be shown remains open); *United States* v. *Porterfield*, 624 F.2d 122 (10th Cir. 1980).

the representation actually afforded by Hotchkiss in the time allowed to the termination of respondent's prior attorney-client relationship with Goldfine (Pet. App. A-21 to A-22 n.4). We do not believe that the holding in *Chambers* may be so easily avoided. In that case, a necessary corollary to the appearance by the second Legal Aid Society lawyer immediately before trial was the termination of the representation of the defendant by the first lawyer assigned to the defense. We seriously doubt that the Court, having declined to set aside the conviction in the absence of a showing of prejudice resulting from the second attorney's belated appearance, would nevertheless have been prepared to order precisely that relief if only the defendant had professed a desire to have been represented at trial by the first attorney.

To be sure, there is no indication in *Chambers* that either the defendant or counsel moved for a continuance prior to trial; the objection to the second attorney's asserted lack of preparation apparently was not raised until after trial (see 399 U.S. at 47 n.5). Here, of course, respondent did request a continuance (or at least the trial court construed his complaints to constitute such a request), and the court of appeals held that the trial court should not have denied that request without first inquiring into how long Goldfine would be unavailable. Once again, however, this reasoning erroneously shifts the inquiry away from the effect that the denial of a continuance had on the actions of the attorney who actually represented respondent at trial—the focus this Court's decisions indicate is appropriate where it is argued that the denial of a continuance violated the defendant's right to the assistance of counsel[3]—to speculation regarding the defendant's relationship with another attorney who played no role in the trial at which he was convicted. We do

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[3] See, *e.g.*, *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 588-591; *Chandler* v. *Fretag*, *supra*, 348 U.S. at 9-10; *Hawk* v. *Olson*, *supra*, 326 U.S. at 276-278; *White* v. *Ragen*, *supra*, 324 U.S. at 764; *Avery* v. *Alabama*, *supra*, 308 U.S. at 450-453; *Powell* v. *Alabama*, *supra*, 287 U.S. at 71.

not believe that the requirements for the setting aside of a conviction under *Ungar* v. *Sarafite*, *Avery* v. *Alabama*, and related cases because of the denial of a continuance should be so readily circumvented.

1. Respondent Did Not Request a Continuance For The Purpose Of Enabling Him To Be Represented By The First Deputy Public Defender Assigned To His Case

The first flaw in the court of appeals' reasoning that respondent's convictions must be set aside because the trial court failed to inquire into the likely duration of Goldfine's absence before granting a continuance is that respondent did not request the trial court to make such an inquiry. Nor, contrary to the court of appeals' apparent belief (Pet. App. A-7), did respondent request that the trial be postponed until Goldfine would be available to represent him. In fact, respondent did not even express a preference to be represented by Goldfine rather than Hotchkiss. Respondent simply asserted that *Hotchkiss* needed more time to prepare for the trial. Because respondent did not assert a right to be represented by Goldfine when the court was considering whether to grant a continuance,[4] the trial court did not deprive him of any such right

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[4] On the second day of trial, respondent observed in passing that "Mr. Harvey Goldfine was my attorney, he was my attorney, and he still is" (J.A. 24). A fair reading of the entire exchange on this occasion indicates, however, that respondent's objections related to Hotchkiss' performance (J.A. 15-28). Indeed, respondent stated that Goldfine had not had an opportunity to go over the case with him either (J.A. 24).

Four days later, on the third day of trial, respondent asserted more forcefully that Goldfine was his attorney and that he did not have an attorney at trial because Goldfine was in the hospital (J.A. 29, 32, 38). The trial court understood respondent merely to be raising once more his objections to Hotchkiss' preparation, and it accordingly rejected respondent's complaint (J.A. 30-31). Even if respondent's statements should have been construed to constitute a request for a continuance on a new ground—this time, to allow time for Goldfine to

by not continuing the trial until Goldfine was available or determining how long Goldfine would be unavailable. By the same token, respondent must be held to have waived any such right by failing to assert it in a timely fashion.[5]

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recover—the court could not be faulted for declining to grant a long mid-trial continuance on a ground that could have been asserted prior to trial, especially since respondent's own lack of cooperation with Hotchkiss appears to have been a significant contributing factor underlying the request (see J.A. 29-41). *United States* v. *Badwan*, *supra*, 624 F.2d at 1231; *United States* v. *Burton*, 584 F.2d 485, 490-491, 497 (D.C. Cir. 1978); cert. denied, 439 U.S. 1069 (1979); *United States* v. *Williams*, 594 F.2d 1258, 1260-1261 (9th Cir. 1979); *United States* v. *Michelson*, 559 F.2d 567, 571-572 (9th Cir. 1977); *Maynard* v. *Meachum*, 545 F.2d 273, 277-278 (1st Cir. 1976).

Respondent argued below that the trial court should have replaced Hotchkiss as counsel in light of asserted irreconcilable differences between them, irrespective of any independent desire respondent might have had to be represented specifically by Goldfine. Resolution of this issue, too, would require a consideration of the timing of the incidents and respondent's responsibility for them. See *United States* v. *Williams*, *supra*; *United States* v. *Michelson*, *supra*; *Maynard* v. *Meachum*, *supra*; see also *McKee* v. *Harris*, 649 F.2d 927 (2d Cir. 1981); *United States* v. *Altamirano*, 633 F.2d 147, 152 (9th Cir. 1980), cert. denied, No. 80-6168 (Oct. 5, 1981); *Wilks* v. *Israel*, 627 F.2d 32, 34-36 (7th Cir. 1980), cert. denied, 449 U.S. 1086 (1981). We note as well that an attorney's pessimism about the case, which seems to have motivated respondent's actions (J.A. 29, 34, 38, 41), is not alone a sufficient basis for requiring appointment of new counsel. *McKee* v. *Harris*, *supra*, 649 F.2d at 931-932; *Brown* v. *United States*, 264 F.2d 363, 368 (D.C. Cir.) (Burger, J., concurring), cert. denied, 360 U.S. 911 (1959). The court of appeals did not reach this issue (Pet. App. A-25), and there would appear to be no occasion for this Court to reach it either.

[5] Apparently acknowledging that he did not request a continuance at the outset of the trial in order to enable Goldfine to represent him, respondent now argues (Br. in Opp. 16-17) that he should not be penalized for his inability correctly to articulate the precise legal or constitutional grounds for a continuance. This attempt to avoid the consequences of his default is without merit. A defendant's assertion

Respondent's failure to assert an interest in being represented by Goldfine rather than Hotchkiss at the time the court considered whether to grant a continuance also is significant because whether the refusal to grant a continuance violated the defendant's constitutional rights depends "particularly [on] the reasons presented to the trial judge at the time the request is denied." *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 589; *Brown* v. *United States*, 264 F.2d 363, 367-369 (D.C. Cir.) (Burger, J., concurring) cert. denied, 360 U.S. 911 (1959); see also *United States* v. *Badwan*, *supra*, 624 F.2d at 1229-1230, 1231; *Giacalone* v. *Lucas*, 445 F.2d 1238, 1243 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972). In addition, the failure of respondent to assert a preference to be represented by Goldfine at the time the request for a continuance was denied distinguishes this case from all of those upon which the court of appeals relied in finding a Sixth Amendment violation (see Pet. App. A-11 to A-19); in each of those cases, there was an explicit request for a continuance in order to enable counsel of choice to appear. See *Gandy* v. *Alabama*, 569 F.2d 1318, 1320 (5th Cir. 1978); *United States* v. *Seale*, 461 F.2d 345, 356-361 (7th Cir. 1972); *Releford* v. *United States*, 288 F.2d 298, 300-301 (9th Cir. 1961); *Smith* v. *Superior Court*, 68 Cal. 2d 547, 553-554, 440 P.2d 65, 68-69, 68 Cal. Rptr. 1, 5 (1968); see also *Linton* v. *Perini*, 656 F.2d 207, 208, 212 (6th Cir. 1981); *United States* v. *Mardian*, 546 F.2d 973, 979-980 (D.C. Cir. 1976); *Giacalone* v. *Lucas*, *supra*, 445 F.2d at 1239-1240.

Furthermore, this is not a case in which there were other circumstances that should have caused the trial court to inquire about respondent's desire to be represented by Goldfine even in the absence of a specific request. Cf. *Cuyler* v. *Sulli-*

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of a preference to be represented by a lawyer other than the one appearing on his behalf does not require a knowledge of legal or constitutional principles beyond the reach of a layman, but simply an expression of his own desires. There is, accordingly, nothing unfair about insisting that the defendant communicate his desire to the court before the trial begins, either himself or through his substitute counsel.

van, *supra*, 446 U.S. at 346-348. The Public Defender's Office, not Goldfine personally, was appointed to represent respondent (compare *Chambers* v. *Maroney*, *supra*, 399 U.S. at 53); the circumstances of the appointment of counsel therefore themselves indicated that the Public Defender would assign, and if necessary reassign, a member of his staff to the case.[6] Goldfine's appendectomy was a self-evidently sufficient reason for his unavailability, and there was no reason to believe that respondent would question the propriety of the Public Defender's designation of a substitute in such a situation. In fact, respondent expressed his satisfaction with being represented by the Public Defender (J.A. 12) and did not question Hotchkiss' competence (J.A. 18). Against this background, the trial

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[6] Appointment of the public defender's office or of the chief public defender as counsel of record to represent an indigent defendant is not the uniform practice. We have been informed by the Administrative Office for U.S. Courts, for example, that under federal public defender plans it is more common for an individual deputy public defender to be appointed by the court as counsel of record. See 18 U.S.C. 3006A(b). We believe that both models are consistent with the Sixth Amendment, which provides only that the accused has a right to the assistance of counsel. That Amendment does not, in our view, require that the court formally designate the attorney who will represent an indigent defendant, just as it does not require the court to designate retained counsel.

Nor do we perceive any violation of constitutional or ethical principles in vesting in the public defender the responsibility for assignment or reassignment of attorneys to handle particular cases or even particular stages of cases (such as the preliminary hearing or lineup), so long as individual accountability (see *Powell* v. *Alabama*, *supra*, 287 U.S. at 56) and appropriate independence (*Polk County* v. *Dodson*, No. 80-824 (Dec. 14, 1981), slip op. 9 n.11) are maintained and the defendant has an opportunity to convey his confidences. See *Greenfield* v. *Gunn*, 556 F.2d 935, 938 (9th Cir.), cert. denied, 434 U.S. 928 (1977). We likewise do not believe there would be a violation of these principles if the chief public defender supervised the work of his deputies, within appropriate limits, especially where the chief defender himself is appointed as counsel of record.

court was justified in proceeding on the assumption that respondent was content to be represented by a substitute attorney from the Public Defender's Office, so long as that attorney was suitably prepared. Cf. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346-347. When the court determined that Hotchkiss was prepared, it was entirely appropriate to begin the trial.

2. Respondent Was Not, In Any Event, Impermissibly Deprived Of Counsel Of His Choice

Even assuming, contrary to our submission above, that respondent sufficiently asserted a preference to be represented by Goldfine rather than Hotchkiss, the trial court did not violate respondent's constitutional rights when it denied a continuance.

a. The central purpose of Sixth Amendment right of an accused to have the assistance of counsel for his defense is "to assure fairness in the adversary criminal process." *United States* v. *Morrison*, *supra*, 449 U.S. at 364. Defense counsel serves to counterbalance the skilled prosecutor. *United States* v. *Ash*, 413 U.S. 300, 308-309 (1973); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). Moreover, "[l]eft without the aid of counsel [the accused] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Powell* v. *Alabama*, *supra*, 287 U.S. at 69. For these reasons, "[h]e requires the guiding hand of counsel at every step in the proceedings." *Ibid.*; see also *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963). This Court's implementation of the Sixth Amendment guarantee therefore has been designed "to assure the defendant the effective assistance of counsel and a fair trial." *United States* v. *Morrison*, *supra*, 449 U.S. at 365.

In this case, both the language and purposes of the Sixth Amendment were fully satisfied. Respondent had "the assistance of counsel for his defense"; he had "the guiding hand of counsel at every step in the proceedings"—first that of Goldfine, and when he became unavailable, of Hotchkiss. Respon-

dent has not shown that this assistance did not "assure [him] the effective assistance of counsel and a fair trial." *United States* v. *Morrison*, *supra*. The court of appeals, however, found a violation of the right to counsel by looking solely to the identity of the attorney, not to the quality of his performance or the fairness of the trial.

We note preliminarily that the court of appeals here, like other courts of appeals (see, *e.g.*,. *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *Linton* v. *Perini*, *supra*, 656 F.2d at 209-211; *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973)), indulged without critical examination the assumption that the right (if any) of a criminal defendant to be represented by counsel of his own choosing springs from the Sixth Amendment. But in cases like the present one, as noted above, the terms and purposes of the Sixth Amendment were fully satisfied by the provision of the effective assistance of competent counsel at trial. The nature of the criminal defendant's desire to be represented by a particular attorney is in fact not materially different from the like desire of a party to a civil case; to the extent the Constitution protects that interest, it is by the Due Process Clauses of the Fifth and Fourteenth Amendments. This conclusion is in fact confirmed by this Court's decision in *Powell* v. *Alabama*, *supra*. That *Powell* did not involve an incorporation of Sixth Amendment principles through the Due Process Clause of the Fourteenth Amendment is evidenced by the statement in *Powell* that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense." 287 U.S. at 69. See also *Gandy* v. *Alabama*, *supra*, 569 F.2d at 1321.

b. Whatever the source of the constitutional protection afforded a defendant's interest in being represented by a particular attorney, it is in any event clear that the protection is not absolute, even in the case of retained counsel. As a practical matter, for example a litigant cannot be guaranteed an abso-

lute right to be represented by any given attorney, for that attorney might be unwilling or unable to accept the case. The Constitution likewise does not furnish a party's selection of a particular attorney an absolute immunity from governmental actions that might affect the availability of counsel. This much is evident from the decision in *Powell* v. *Alabama* as well. That decision speaks only of a "fair opportunity," not an absolute right, to secure counsel of one's choice, and states only that due process principles are violated if a court "arbitrarily" denies a party's request to be heard through the counsel he has retained. 287 U.S. at 53, 69.

Consistent with these principles, courts considering the need for a continuance uniformly have recognized that the right to be represented by a particular attorney cannot override "the public's interest in the orderly administration of justice." *United States* v. *Burton*, *supra*, 584 F.2d at 489. Thus, even where the defendant's ability to be represented by his chosen counsel, or by any counsel, may be affected, this Court has stressed that the grant or denial of a continuance is committed to the sound discretion of the trial court and will be reversed only if the decision is "so arbitrary as to violate due process." *Unga:* v. *Sarafite*, *supra*, 376 U.S. at 589; see also *Linton* v. *Perini*, *supra*, 656 F.2d at 211; *United States* v. *Burton*, *supra*, 584 F.2d at 490; *Gandy* v. *Alabama*, *supra*, 569 F.2d at 1322-1323.

The issue of a defendant's right to the assistance of counsel of his choice also has arisen in other contexts that could be affected by the Ninth Circuit's decision. For example, a defendant often claims a right to be represented by a particular lawyer even where that representation would violate rules governing the practice of law. In our view, however, the Sixth Amendment and the Due Process Clauses permit reasonable regulation of the practice of law designed to ensure that persons who appear as officers of the court will possess the necessary qualifications and familiarity with local procedures and will abide by standards that are reasonably calculated to preserve the fairness and integrity of the administration of justice and public confidence in the judicial system. Surely, for

example, a defendant does not have a constitutional right to be represented by a lay person, a disbarred attorney, an attorney who has not been admitted to practice before the court, cf. *Leis* v. *Flynt*, 439 U.S. 438 (1979), an attorney who is implicated in the very crime in question, *United States* v. *Salinas*, 618 F.2d 1092 (5th Cir. 1980), or an attorney whose conduct in the case has been contemptuous, *United States* v. *Dinitz*, 424 U.S. 600, 603-605 (1976).

That such incidental restrictions on the availability of a particular attorney in a given case are consistent with principles of due process and the Sixth Amendment is apparent from the first sentence of Section 35 of the Judiciary Act of 1789, ch. 201 Stat. 73, 92, now codified at 28 U.S.C. 1654. Section 35 provided a statutory right to appear in federal court through counsel—presumably counsel of one's choice—but with an important limitation (emphasis added):

> [I]n all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of *such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.*

This provision, enacted by the First Congress and signed into law one day before the Sixth Amendment was proposed, is a compelling indication that the parallel right to the assistance of counsel in the Sixth Amendment was not intended by the Framers to confer on a defendant's selection of an attorney an absolute immunity from the reasonable regulation of the practice of law. See *Faretta* v. *California*, 422 U.S. 806, 812-813, 831-832 (1975).

Regulation of the practice of law to prevent conflicts of interest in criminal cases is equally consistent with the Sixth Amendment and the Due Process Clauses, even in situations in which the defendant himself might be prepared to accept the services of an attorney who is laboring under a conflict of interest. Although one purpose of these ethical rules is to protect the interests of the individual client in a given case, such rules also serve broader governmental and public interests of transcending importance: ensuring the integrity of

the bar and of the administration of justice and the confidence of the public in the criminal justice system. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 460-468 (1978); *Cohen* v. *Hurley*, 366 U.S. 117, 123-124 (1961).

In furtherance of these interests, well-established ethical standards for attorneys provide that a lawyer shall not represent several clients in the same case except where all clients consent *and* it is "obvious" or "clear" that the lawyer can adequately represent the interests of each. ABA *Code of Professional Responsibility* DR 5-105, EC 5-15 (1978 ed), cited in *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346 n.11; ABA *Standards Relating to the Administration of Justice: The Defense Function* § 3.5(b) (App. Draft 1971), at 211. These rules presuppose that there will be situations in which it would be improper for a lawyer to represent several defendants, even if they consent to the representation and thereby waive their right to the effective assistance of counsel that otherwise might be violated by the existence of the conflict. See also 18 U.S.C. 3006A(b).

The application of these rules to protect the integrity of the administration of justice does not impermissibly interfere with a defendant's constitutionally protected right to counsel of his choice. Disqualification does not deprive the accused of access to the assistance of counsel for his defense—the explicit guarantee of the Sixth Amendment. And when the disqualified attorney is eliminated from the pool of available counsel, the accused must be presumed still to have a sufficiently "fair opportunity to secure counsel of his own choice" (*Powell* v. *Alabama*, *supra*, 287 U.S. at 53) from among those who remain.

This Court's promulgation of Fed. R. Crim. P. 44(c) reinforces the conclusion that the Constitution does not bar the exercise of a trial court's discretion to disqualify defense counsel in appropriate circumstances. Rule 44(c) provides that in cases of joint representation, unless there is good cause to believe that no conflict of interest is likely to arise, "the court shall take such measures as may be appropriate to protect each defendant's right to counsel." The Notes of the Advisory Com-

mittee make clear that the selection of measures is left to the discretion of the district court (77 F.R.D. 594, 600) and that the court may exercise its supervisory power to disqualify a lawyer in a conflict of interest situation even if the defendant expresses a desire to retain him (*id.* at 600-603). See also *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1394-1395 & n.120 (1981).[7]

The Third Circuit recently applied these principles in sustaining the pretrial disqualification of a lawyer under Rule 44(c) where it was likely that a conflict of interest would materialize. The court stated that "[a]lthough the sixth amendment and the due process clause of the fifth amendment do afford some protection for a defendant's decision to select a particular attorney, that protection goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of his choice." *United States* v. *Flanagan*, No. 81-3116 (June 2, 1982), slip op. 7. Accordingly, the court reasoned that federal district courts properly may enforce ethical standards prohibiting conflicts of interest, notwithstanding the defendant's objection. Slip op. 8-9.[8] The

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[7] The Advisory Committee Notes also reject the suggestion that this Court's decision in *Faretta* v. *California*, *supra*, which holds that the Sixth Amendment guarantees a right of self-representation, also implies an absolute right in the accused to counsel of his choice notwithstanding a conflict of interest. 77 F.R.D. 603. See also *United States* v. *Flanagan*, No. 81-3116 (3d Cir. June 2, 1982), slip op. 8-9 & n.5; *United States* v. *Dolan*, 570 F.2 1177, 1183 (3d Cir. 1978). We have discussed the inapplicability of *Faretta* in this regard in our Brief in Opposition in *Lewin* v. *United States*, No. 80-343, (1980 Term), at 7-9.

[8] As the Third Circuit recognized, the Second and Fifth Circuits have taken a contrary view, concluding that trial courts must accept knowing and intelligent waivers in cases of actual or potential conflicts. Slip op. 9 n.5, citing *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), and *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975). See also *United States* v. *Curcio*, No. 82-1066 (2d Cir. May 26, 1982), slip op. 2753-2754, 2756-2758; *United States* v. *Cunningham*, 672 F.2d 1064, 1070-1071 (2d Cir. 1982). Cf. *United States*

court acknowledged that "[a] defendant's choice of counsel is not to be dealt with lightly or arbitrarily" or "interfered with in cases where potential conflicts of interest are highly speculative," but found no abuse of discretion in that case. Slip op. 10.[9]

As the foregoing discussion makes clear, the Constitution protects a defendant's choice of retained counsel only from arbitrary interference, not from the operation of laws, regulations, and judicial orders that are rationally related to the furtherance of independent and legitimate governmental purposes. Moreover, the trial court's determination of the degree to which a defendant's preference for a particular attorney is to be accommodated in a given case ordinarily should be reviewed only for an abuse of discretion.

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v. *Agosto*, 675 F.2d 965, 969-970 (8th Cir. 1982), petition for cert. pending, No. 81-2270. In our view, these decisions do not give sufficient weight to the independent public interest in preventing conflicts. Indeed, in its recent *Curcio* decision, the Second Circuit itself noted its "serious misgivings" and "uneasiness" about sanctioning joint representation where there is a conflict of interest. Slip op. 2758, 2759. See also *id.* at 2760-2761 & n.3; *United States* v. *Garcia*, *supra*, 517 F.2d at 273-274.

[9] As we explained in our amicus curiae brief in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), No. 79-1420, at 30-31 n.27, some courts of appeals apply an abuse of discretion standard in reviewing the actions of the district court in attorney disqualification cases (see, *e.g.*, *United States* v. *Agosto*, note 8, *supra*, 675 F.2d at 970); *In re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1358 (9th Cir. 1981), cert. denied, No. 81-1286 (Mar. 1, 1982)), while others indicate that, at least where factual issues are not in dispute, a closer review of legal issues is warranted. Where an element of prediction is involved, however, as in the case of pretrial disqualification of defense counsel based on the likelihood that a conflict of interest will emerge, the deference afforded to the trial court's judgment by the abuse of discretion standard is especially appropriate. See also Advisory Committee Notes to Fed. R. Crim. P. 44(c), 77 F.R.D. 596-597, quoting *United States* v. *Mari*, 526 F.2d 117, 121 (2d Cir. 1975) (concurring opinion).

c. It is unclear to what extent the constitutional considerations just discussed are even implicated where, as here, the defendant is indigent and counsel is appointed by the court rather than retained by the defendant. In such situations, the defendant presumably has, of necessity, foregone the constitutionally protected "opportunity to secure counsel of his own choice." *Powell* v. *Alabama*, *supra*, 287 U.S. at 53. It is well-settled that an indigent defendant does not have a right to the appointment of a particular attorney to his case; indeed, there are persuasive policy reasons for a court not to accede to the defendant's preference, in order to ensure even-handed assignment of cases and to avoid overburdening favored lawyers or affording an unfair advantage to habitual or sophisticated offenders. ABA *Project on Standards for Criminal Justice: Standards Relating to Providing Defense Services* § 2.3 (App. Draft 1968), at 29-30; *id.* § 5.3, at 50-51; *United States* v. *Green*, 630 F.2d 566, 568 (8th Cir.), cert. denied, 449 U.S. 904 (1980); *United States* v. *Davis*, 604 F.2d 474, 478-479 (7th Cir. 1979); *United States* v. *White*, 451 F.2d 1225 (6th Cir. 1971).

The standards of the legal profession and the sound and efficient administration of a program for the furnishing of defense services ordinarily would indicate that once a particular attorney has been appointed to represent the defendant at trial, entered into an attorney-client relationship with him, and devoted substantial efforts to preparation of the defense, that attorney should not lightly withdraw or be replaced. See *ABA Code of Professional Responsibility* DR 2-110(B) and (C) (1978 ed.); ABA *Standards Relating to Providing Defense Services*, *supra*, § 5.2 and § 5.3. Because the Constitution affords an indigent defendant no right to the appointment of the attorney of his choice in the first instance, however, it is questionable whether the Constitution speaks to the issue of withdrawal of counsel or the substitution of one appointed counsel for another. But even if it does, as the court of appeals held, the Constitution would warrant scrutiny of the judicial order or other governmental action at issue only to determine if it arbitrarily interfered with an attorney-client relationship. The

substitution of Hotchkiss for Goldfine and the denial of a continuance in this case plainly did not violate this standard.

The court appointed the Public Defender's Office, not Goldfine personally, to represent respondent. In light of this, it would have been reasonable to assume that the Public Defender might have to reassign the case within the Office under some circumstances. Serious illness is unquestionably a legitimate ground for an attorney to withdraw from a case. ABA *Code of Professional Responsibility* DR 2-110(B)(3) and DR 2-110(C)(4); ABA *Standards Relating to Providing Defense Services*, *supra*, § 5.3 Goldfine's illness accordingly was an entirely appropriate reason for the Public Defender to assign another attorney to represent respondent. The fact that counsel of record, the Public Defender (J.A. 6, 43), had replaced the attorney who respondent now claims was his counsel of choice distinguishes this case from those upon which the court of appeals relied. See cases cited at page 15-16, *supra*. In those cases, the attorney of record wanted to continue his representation in the case.

The transition in this case was, moreover, carried out in a responsible fashion. Hotchkiss promptly contacted respondent and met with him on several occasions prior to trial, and the files were made available to Hotchkiss for use in the case. See ABA *Code of Professional Responsibility* DR 2-110(A)(2). By the time that respondent raised an objection on the first day of trial, Hotchkiss had devoted considerable time to the case. In these circumstances, it was entirely reasonable to proceed to trial as scheduled with Hotchkiss as defense counsel, without inquiring further into the details of Goldfine's illness.

3. Even If the Trial Court's Actions Violated Respondent's Constitutional Rights, He Is Not Entitled To A New Trial Without A Showing Of Prejudice

Even if, contrary to our submission above, the trial court's failure to inquire about the expected duration of Goldfine's illness before denying a continuance violated respondent's constitutional rights, the court of appeals nevertheless erred in setting aside respondent's conviction. This Court held just last

term that cases involving deprivations of the Sixth Amendment right to counsel are subject to the general rule that remedies should be tailored to the injury suffered as a result of the constitutional violation and should not unnecessarily infringe on the competing societal interest in the administration of criminal justice. *United States* v. *Morrison*, *supra*, 449 U.S. at 364. After reviewing its prior decisions, the Court explained (*id.* at 365):

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

Applying these principles in the present case, the Ninth Circuit plainly erred in setting aside respondent's conviction.

Here, respondent has not shown, and no court has found, that the substitution of counsel had any adverse impact upon the effectiveness of the assistance of counsel respondent received at trial or produced any other prejudice to the defense or to respondent's right to a fair trial. Absent such an adverse impact on the criminal proceeding itself, "there is no basis for imposing a remedy in that proceeding" (449 U.S. at 365), with the attendant costs to society's interest in the administration of justice.[10] These competing considerations are of even greater

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[10] See also *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, 449 U.S. at 378, in which the Court observed that a court of appeals could reverse the judgment of the trial court upon a showing that an erroneous ruling on a disqualification motion was "prejudicial error."

Citing its decision in the instant case, the Ninth Circuit held in *United States* v. *Greger*, 657 F.2d 1109, 1113 (1981), petition for cert. pending, No. 81-1357, that a pretrial order disqualifying defense

significance in a case involving a collateral attack on a conviction. *Engle* v. *Isaac*, *supra*, slip op. 17-21.

The court of appeals held that no showing of prejudice was necessary in this case by relying on decisions of this Court in which a showing of prejudice was not required where either counsel was not furnished at all[11] or the attorney who did appear at trial was prevented by the court from performing the normal functions of an attorney.[12] Pet. App. A-20 to A-24. The Ninth Circuit held that the denial of a continuance in this case likewise prevented counsel from fulfilling a normal function: the forming and exploiting of an attorney-client relationship with the defendant (Pet. App. A-21 to A-22 n.4). This is simply wrong. The attorney who represented respondent at trial—Hotchkiss—had every opportunity, unimpeded by the court, to enter into and exploit an attorney-client relationship with respondent, and he in fact did so, meeting with respon-

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counsel in a federal criminal case is not immediately appealable under 28 U.S.C. 1291 because, *inter alia*, reversal would be automatic if it were shown on appeal from a final judgment of conviction that the disqualification order was erroneous. We do not believe, however, that the availability of a pretrial appeal should depend on whether prejudice would have to be shown on appeal from a final judgment of conviction. Part of the price of orderly and manageable litigation is that certain orders of the trial court that may have important consequences for the litigants are simply not reviewable on appeal—before trial because allowance of review at that point is too disruptive of the litigation, and after trial because reversal of an otherwise valid judgment is an excessive remedy. This does not mean that clear or egregiously erroneous orders are wholly beyond correction. Mandamus may be available in a suitable case to remedy an arbitrary disqualification of counsel. *Risjord*, *supra*, 449 U.S. at 379 n.13.

[11] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[12] *Geders* v. *United States*, 425 U.S. 80 (1976) (conferring with counsel during overnight recess); *Herring* v. *United States*, 422 U.S. 853 (1975) (summation); *Powell* v. *Alabama*, *supra* (consulting with defendant and preparing for trial); *Glasser* v. *United States*, 315 U.S. 60 (1942); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (offering defendant undivided loyalty).

dent on a number of occasions prior to trial. This case therefore in no way resembles the decisions of this Court in which trial counsel was prevented from performing functions that were, in effect, conclusively presumed to be essential attributes of the assistance of counsel and a fair trial.[13]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1982

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[13] Requiring a showing of prejudice is especially appropriate where, as here, the defendant raised no objection prior to trial to being represented by an attorney who was not his counsel of choice. Cf. *Cuyler* v. *Sullivan*, 446 U.S. at 348-350. We believe it is significant as well that the court of appeals did not hold that respondent actually was entitled to a continuance until Goldfine recovered; it held only that the trial court should have determined how long that recovery would take. If Goldfine would have been unavailable for an extended period, the trial court no doubt would have denied a continuance in any event. In those circumstances, the mere failure to inquire would not have injured respondent, at least not in a manner to warrant the drastic remedy of setting aside the conviction. Cf. *Carey* v. *Piphus*, 435 U.S. 247 (1978). At the very least, then, respondent should be required to show that Goldfine would have been available in a relatively short period of time, such that an inquiry by the trial court might have made some difference.

Docket Sheet

NO. 81-1095-CFH	TITLE John Paul MORRIS, Warden, Petitioner v. Joseph D. Slappy

DOCKETED	COURT
Dec. 11, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Dane R. Gillette
	Counsel for Respondent: Michael B. Bassi
Dec. 11, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 13, 1982	DISTRIBUTED. 2-19.
Jan 19, 1982	Waiver of right to file respondent's brief filed.
Feb. 3, 1982	Response requested.
March 3, 1982	Brief for the respondent in opposition filed.
March 10, 1982	DISTRIBUTED. 3-26.
March 29, 1982	Petition GRANTED.

April 6, 1982	Motion of respondent Joseph D. Slappy for leave to proceed further herein in forma pauperis filed.
April 6, 1982	Motion of respondent Joseph D. Slappy for appointment of counsel filed.
Apr. 7, 1982	DISTRIBUTED. 4-23. (Above two motions).
Apr. 19, 1982	Joint appendix filed.
Apr. 26, 1982	The motion of respondent for leave to proceed further herein in forma paueris is GRANTED. The motion for appointment of counsel is GRANTED and it is ordered that Michael B. Bassi, Esquire, of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
May 6, 1982	Order extending time to file the petitioner's brief on the merits until June 12, 1982.
June 3, 1982	Brief for the petitioner filed.
June 14, 1982	Order extending time to file the respondent's brief on the merits until Aug. 11, 1982.
June 19, 1982	Brief, amicus curiae, for the U. S. filed.
June 18, 1982	Motion of National Legal Aid and Defender Association for leave to participate in oral argument as amicus curiae and for additional time for oral argument filed.
June 28, 1982	The motion of National Legal Aid and Defender Association for leave to participate in oral argument as amicus curiae and for additional time for oral argument is DENIED.
	(Over)

81-1095

Title

No.

DATE	PROCEEDINGS AND ORDERS
Aug. 9, 1982	Brief for the respondent filed.
Aug. 11, 1982	Brief, amici curiae, of The National Association of Criminal Defense Lawyers, et al. filed in support of respondents.
Sept. 15, 1982	CIRCULATED.
Nov. 17, 1982	Reply brief for the petitioner filed. (D).
Dec. 1, 1982	ARGUED.